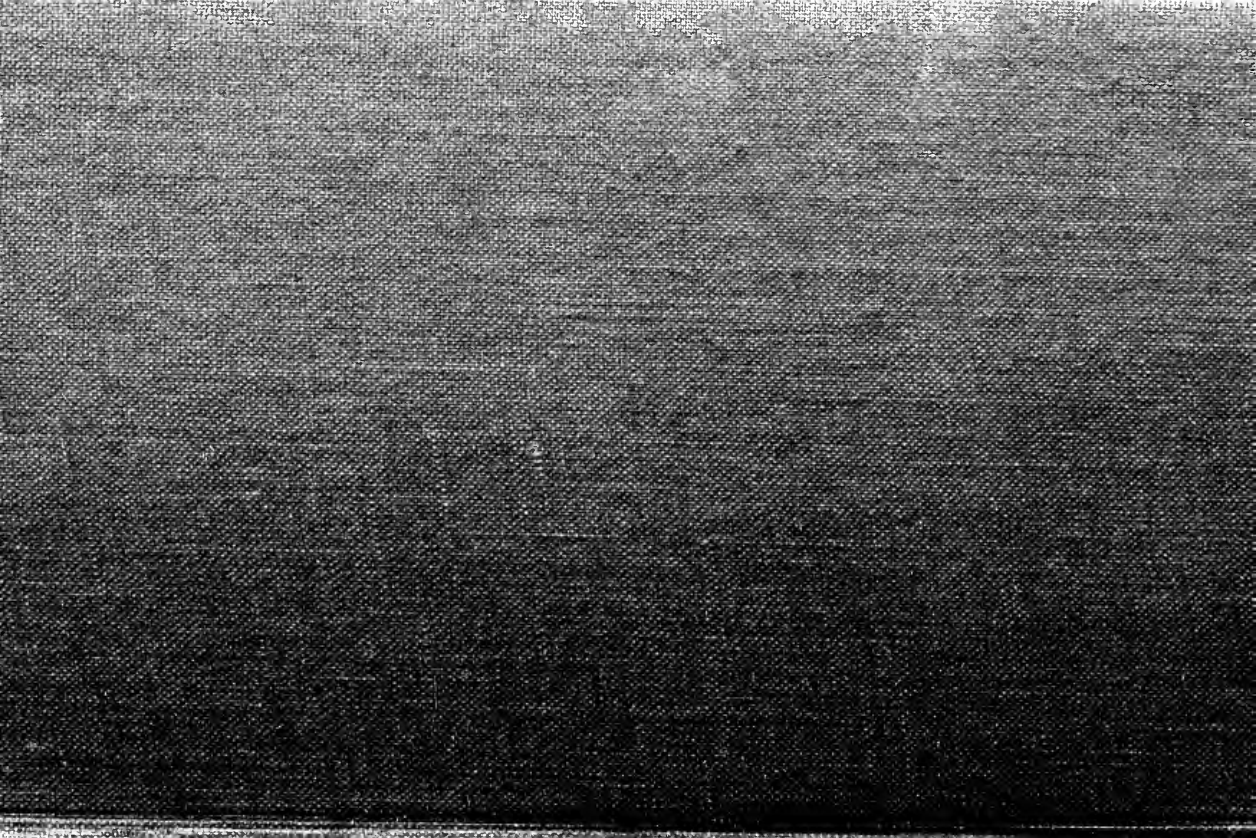


FOREIGN AND HOME LAW

Its Main Points of Contact With Our Foreign Trade

By
PHANOR JAMES EDER
Of the New York Bar

Being the Tenth
Unit of a Course
in Foreign Trade

BUSINESS TRAINING CORPORATION
NEW YORK CITY

Course in Foreign Trade

Edward Ewing Pratt - - - *Director*
Edward Leonard Bächer - *Secretary*

The text of the Course is issued in twelve units as follows:

	TITLE	AUTHOR
I.	Economics of World Trade . .	O. P. Austin
II.	The World's Markets . . .	Edward Neville Vose
III.	Export Policies	P. B. Kennedy E. C. Porter
IV.	Export Houses	John F. Fowler C. A. Richards Henry A. Talbot
V.	Direct Exporting	Walter F. Wyman
VI.	The Export Salesman . . .	Paul R. Mahony
VII.	Shipping	Emory R. Johnson Grover G. Huebner
VIII.	Financing	E. A. de Lima J. Santilhano
IX.	Export Technique	Edward L. Bächer
X.	Foreign and Home Law . . .	Phanor J. Eder
XI.	Importing	Carl W. Stern
XII.	Factors in Trade-Building . .	Chauncey D. Snow

BUSINESS TRAINING CORPORATION
NEW YORK CITY

PREFACE

THE author wishes to acknowledge his indebtedness to Mr. L. Domeratzky, of the United States Department of Commerce, who was kind enough to write the chapter on "Tariffs and Customs Laws," and to Dix W. Noel, Esq., of the New York Bar, for assistance in revising the manuscript.

The principles of law enunciated have been compiled from standard legal treatises, codes and cases too numerous to mention in detail. The chief difficulty has been that of appropriate selection.

P. J. E.

CONTENTS

Business and the Law

THE law is a mould. Foreign or home business must work within and adapt itself to the forms prescribed by the law.

The law is a tool. Resort must be had to the rules of law to know one's rights, and to the processes of the law to enforce them.

The law is part of human nature. Known or unknown, consciously or subconsciously, the law enters profoundly into the psychology of all with whom business is done.

It is of vital importance for the overseas trader to consider legal conditions in foreign countries. He ignores them at his peril. Unfamiliarity with legal requirements invites disaster. On the other hand, golden vistas of opportunity open before the merchant who acquaints himself with the laws and commercial customs founded on law of the lands with which he trades.

I

Relation of Law to Foreign Trade

THE subject of law in its relation to foreign trade presents a double aspect: The law of the home country or state, and the law of the foreign countries in which business is done.

When you consider that in the United States there are 48 separate states and that abroad there are some 50 independent countries; that each state and each sovereign country has its distinctive law, to say nothing of the colonies, most of which also have their own laws, it seems at first sight an almost hopeless task for a writer to undertake to review in small compass so large a subject.

Fortunately, there are two closely related circumstances which mitigate the difficulty: First, in that branch of law in which the exporter and importer are most interested—namely, commercial law and especially commercial law governing foreign transactions—there is a degree of substantial uniformity in fundamental principles throughout the world. From time immemorial, trade has been cosmopolitan. Second, the business man is in the

Commercial Law and Commercial Usage

habit of trusting, not so much to the law, as to business usages, business honor and the credit and reputation for fair dealing of those with whom he trades and to the practical necessity they are under to maintain that credit and reputation. He feels that if he follows established business practises, he will be safe.

That feeling is justified. Commercial law —or, as it used to be called, the "law merchant"—has been largely built up from the usages of merchants and is often merely the result of the application in courts of law of the rules previously established by merchants among themselves. Reciprocally, established forms and even the very words in common commercial documents are due to precepts of the law, or decisions of the courts of which the business men who use them may be entirely ignorant.

A simple illustration is the ordinary promissory note. The words in it, "to the order of" and "for value received," are of vital legal importance. Similarly, many of the words in the conventional commercial papers—drafts, bills of lading, warehouse receipts, insurance policies, bank pass-books, even accounts and business correspondence—have a well-established legal meaning and effect. They are often the crystallization of the law as it has

been gradually established through generations. The business man employs them without a thought, just as he handles a ten dollar bill, wholly regardless of whether it is a treasury silver certificate, a gold certificate, a national bank note or a federal reserve note.

The object of this text is to give a very brief résumé of those fundamental topics of commercial law that are of particular interest in foreign, especially export trade, on which there is substantial agreement throughout the world. It will also point out, by the comparative method, some of the more important variations among different systems of law. It is intended to serve merely as an introductory guide—an eye-opener—to help develop that business instinct in an export trader which will tell him when he can safely trust his own judgment or when he ought to be on his guard and either study the law carefully himself, consult his general lawyer or resort to a specialist. The well-trained business man is fully as competent as the average legal practitioner to handle many matters of commercial law, such as those involving compliance with governmental administrative regulations, revenue returns, customs papers and the like.

When it comes to foreign laws the average legal practitioner is generally unable to advise. He may not even know where to turn

to obtain the advice. Cases in our courts, in which the results have been disastrous because no attempt was made to prove the law of a foreign country that was applicable, are numerous. This is remarkable, for the commerce of the world has become so interrelated and society has become so cosmopolitan that there are now in the largest mercantile cities firms of lawyers engaged in international business who are specialists in the laws of particular foreign countries. Many maintain offices or have correspondents abroad, and are prepared to assist the exporter or the exporter's lawyer when special problems arise.

The average business man has a tolerably clear idea of domestic commercial law. He understands, for instance, what is and what is not a contract, although he may not be versed in the technicalities of the rules governing its interpretation. He knows that important contracts should be reduced to writing, though he may never have heard of the misnamed Statute of Frauds. Such general knowledge, then, will be taken for granted in this discussion.

From the legal standpoint, all of the civilized nations may be divided into two groups. The United States, England and most British colonies constitute one group, conspicu-

Common Law	Civil Law	Civil Law Influenced by Common Law	Native Law Influenced by Civil Law
EUROPE			
England, Wales, Ireland, Isle of Man, Gibraltar.	Channel Islands, Malta, all Continental Europe (except Turkey), Iceland, Greenland.	Scotland.	Turkey.
ASIA			
British India (including Burma), Ceylon, Hongkong, Straits Settlements, Wei-Hai-Wei.	Russia in Asia, Japan, Dutch East Indies, Mauritius, Seychelles Islands, Portuguese Colonies.	Philippine Islands.	Turkey in Asia, China, Korea, French Indo-China, Siam.
AFRICA			
North Rhodesia, Nyasaland, Gambia, Gold Coast (Ashanti), North Nigeria, South Nigeria, Sierra Leone, Anglo-Egyptian Sudan, Liberia.	French Congo, French West Africa, French Somaliland, German East Africa, German West Africa, Belgian Congo, Italian Somaliland, Madagascar, Algeria, Eritrea, Senegal, Portuguese and Spanish Colonies.	South Africa.	Abyssinia, Egypt, Tripoli, Tunis.
NORTH AND SOUTH AMERICA			
All Continental United States, including Alaska, except Louisiana. All of Dominion of Canada, except Province of Quebec, Bermuda, Bahamas, Jamaica, Cayman Islands, Turk and Caicos Islands, Leeward Islands, Windward Islands (except St. Lucia), British Honduras, Falkland Islands.	All of the Latin-American Republics, French and Dutch Guiana, French, Dutch and Danish West Indies.	State of Louisiana, Province of Quebec, Porto Rico, Canal Zone, British Guiana, Trinidad, Tobago, St. Lucia.	
OCEANIA AND AUSTRALASIA			
Commonwealth of Australia, New Zealand, Fiji, British Pacific Islands, Hawaii.	French Islands.		
ATLANTIC OCEAN			
St. Helena, Ascension, Tristan da Cunha.	Azores, Madeira, Canary Islands.		

In Cyprus, Federated Malay States, British East Africa, British Somaliland and Uganda native law predominates, influenced chiefly by common law. In Arabia, Persia, Afghanistan, Baluchistan, Tibet, Zanzibar and Morocco native law remains substantially unchanged.

THE LAW THAT PREVAILS IN THE COUNTRIES OF THE WORLD

ous in that no attempt has been made to reduce the general principles of the law in these countries to fundamental codes. In them, the English customary law or "common law" reigns supreme. The law is to be looked for in isolated statutes and in court decisions which constitute binding precedents. These nations are known as "common law" countries.

"Common Law" and "Civil Law" Countries

In the other group stand practically all of the other nations. They have received more directly than the Anglo-American countries the direct inheritance of the Roman law and hence are known as the "civil law" countries. Except the Scandinavian countries, they have embodied the underlying principles of their law and often its detailed application in written codes. These terms, "common law" and "civil law" or "code" countries, will be used constantly throughout this text.

Of the codes in each country, the most important and basic is the civil code. In general, the civil code embraces the fundamental principles and particular rules of law governing persons, property, inheritance, contracts and obligations, including torts or wrongs. Next in importance are the commercial codes, and it is these that especially interest us. The law in these code countries, in con-

trast to English and American law, usually draws a sharp distinction between traders and commercial transactions on the one hand and non-traders and non-commercial transactions on the other. The value of this distinction is not apparent to the Englishman or American, but it in fact exists and we have to give it recognition.

Typical Commercial Codes—French and Spanish

Consideration of typical commercial codes will be a sufficient illustration of their scope and importance in the law.

One of the greatest forward steps in the history of the law was the enactment by Napoleon of a number of codes, including a commercial code. This *Code de Commerce* has served as a model for or been adopted literally by a great many countries. To the French group belong Monaco, the Netherlands and her colonies, Luxemburg, Greece, Turkey, Egypt, French Canada, as well as a number of states in Central and South America. The last named have also utilized Spanish law.

The Spanish law has been in essentials free from any outside influence except the French. The Spanish Commercial Codes of 1829 and 1885 and the old Portuguese Code of 1832 have had a great influence on the commercial law of South and Central America. Italian

and German influence, however, has been felt in the recent codes of Venezuela (1904) and Peru (1902).

German Law Group

The general German Commercial Code, redrafted for the German Empire in 1897, was introduced in the various German states and in Austria about 1861. It represents the first great universal piece of law-making to be found in the civil law of the German states throughout the 1000 years of the development of the German Empire.

It was brought about by the serious hindrances to trade resulting from the diversities and conflict of laws in numberless jurisdictions. There existed a condition similar to that which burdens the United States today. It is becoming essential for business in the United States that power be constitutionally given to the Federal Government, and exercised, to enact general commercial laws for the entire country. Attempting to obtain uniformity of our state laws is too slow, too difficult and too costly a process. We should adopt the efficient German method of federal unification.

Italian and French law played a prominent part in the development of German commercial law, which in turn has exercised a great influence on the legislation of other European

states. The English law, especially of companies, also has influenced the German. The countries which, with Germany, may be said to constitute the group of the German law are Austria, Hungary, Croatia, Slavonia, Bosnia, Herzegovina and Bulgaria. The Scandinavian kingdoms do not possess commercial codifications, although they have important individual laws. German influence is unmistakable in some of them, as it is in Switzerland, which also has no separate commercial code.

The Japanese Commercial Code of 1899 shows a preponderance of German influence, and in turn strongly influenced the Chinese Commercial Code of 1904.

Many recent codes are of mixed character, notably those of Belgium, Italy, Portugal and Servia. They utilize German law to a considerable extent, as well as other laws of French and native sources. The Roumanian law of 1882 was almost wholly Italian.

Mixed Codes

The ground embraced by the commercial codes can be briefly indicated by giving the title headings of the German and French codes.

The German Commercial Code is subdivided as follows:

First Book. Mercantile Class. Sections: Traders, Commercial Register, Firm Name,

Trade Books, Proxy and Commercial Authority, Commercial Assistants and Commercial Apprentices, Commercial Agents, Commercial Brokers.

Second Book. Trading Associations and Sleeping Partnerships. Sections: Public (unlimited) Trading Partnership (titles: Formation, Legal Relations of the Partners to One Another, Legal Relations of Partners to Third Persons, Dissolution and Withdrawal of Partners, Liquidation, Limitation by Lapse of Time), Limited Partnership, Joint Stock Companies (titles: General Provisions, Legal Relationship of the Company and its Members, Constitution and Conduct of the Business, Alterations in the Company's Charter, Dissolution and Nullity of a Company, Penal Provisions), Partnerships Limited by Shares, Sleeping Partnerships.

Third Book. Commercial Transactions. Sections: General Provisions, Commercial Sale, Commission Agency, Forwarding Agencies, Warehousing, Carriage of Goods, Carriage of Goods and Passengers on Railways.

The French Code Napoleon, as reenacted in 1841, is subdivided as follows:

Book I. Commerce in General. Eight titles: Traders; Trade Books; Partnerships and Trading Associations (two sections—Different Kinds of Partnerships and Trading Associations and Their Rules; Disputes between Members and Manner in which They Are Settled); Separation of Property (husband and wife); Ex-

changes; Stockbrokers and Brokers; Pledges and Commission Agents (four sections—Pledges, Commission Agents in General, Commission Agents for Carriages by Land and Water, the Carrier); Purchase and Sale; Bills of Exchange, Promissory Notes and Prescription.

Book II. Maritime Commerce. Fourteen titles: Ships and Other Sea-going Vessels, Seizure and Sales of Ships, Shipowners, The Captain, Engagement and Hiring of Sailors and Crew, Charter-parties and Contracts of Affreightment, The Bill of Lading, Freight, Bottomry Bonds, Insurance (three sections: The Contract of Insurance, Its Forms and Object; Obligations of Insurer and Insured; Abandonment), Average, Jettison and Contribution, Prescription, Pleas in Bar.

Book III. Simple Failures and Fraudulent Bankruptcies. Three titles: Simple Failure (faillite) (subdivided into II chapters), Culpable and Fraudulent Bankruptcies, Restoration to Civil Rights (rehabilitation).

Book IV. Commercial Jurisdiction. Four titles: Organization of the Commercial Courts, Jurisdiction of the Commercial Courts, Form of Procedure in the Commercial Courts, Form of Procedure in the Courts of Appeal.

In France itself, the Code has been largely submerged by amendments and supplementary laws, but in many countries which adopted it, it survives practically intact.

Supplementary Laws

In very few countries will the whole law on any particular topic of commercial law be found in the commercial code. The civil code must be referred to constantly. In many countries, such important subjects as bills of exchange and checks and bankruptcy are in special statutes. In Germany, in addition to the bankruptcy code, there is a special law in regard to setting aside debtors' transactions apart from bankruptcy proceedings, and there are numerous laws supplementary to the code (such as laws relating to commercial legal associations, including trade and industrial unions; laws relating to companies with limited liability; laws relating to insurance, checks, stock and other exchanges, banks, carriage by railway, postal and telegraph service, unfair competition and usury, trade-mark, stamp laws, maritime laws and mercantile courts).

Codification in England and the United States

In England and the United States, while projects for systematic codification have met with little favor, nevertheless, there is a tendency towards codification of particular branches of commercial law. There is a marked difference, however, in the methods adopted. Continental codifiers, in their attempt to create a systematic harmonious or-

ganic whole, do not hesitate freely to lay down new law. English and American draftsmen rest content with restating in concise language and logical form the existing well-established law. Only when there is a conflict of precedents in the court decisions do they legislate anew.

In commercial matters, the most important enactments codifying the law have been:

In *England*, the Bills of Exchange Act, the Partnership Act, the Limited Companies Act, the Sales of Goods Act, the Warehouse Receipts Act.

In the *United States,* the following acts drafted and recommended by the Commissioners on Uniform State Laws—the Negotiable Instruments Act, adopted by 47 states; the Warehouse Receipts Act, by 30 states; the Stock Transfer Act, by 11 states; the Bills of Lading Act and the Sales Act, by 14 states, and the Partnership Act, by 4 states. With these acts, every business man should familiarize himself.

Bearing in mind this wide diversity of laws, we come now to the question of jurisdiction. What are the boundaries of a law's jurisdiction?

The fundamental rule is that all jurisdic-

tion is primarily territorial. The laws of a state or country apply at home, not abroad. Jurisdiction of the courts extends to persons and transactions within, and not beyond, the borders of a country. But within its borders, the laws and the jurisdiction of the courts apply to all, to foreigners as well as to citizens or subjects, to transients as well as to residents.

Jurisdiction

To the rule that jurisdiction is territorial, there are a few exceptions. Some nations, especially in criminal and governmental matters, claim to exercise supervision over the conduct and personal status of their citizens abroad, and also in civil matters their courts enter judgments against citizens abroad. But in general, the validity of a judgment will not be recognized in another country unless the court's process was personally served on the defendant, or the property which was the subject-matter of the suit was within the territorial jurisdiction of the court.

To the rule that the laws and jurisdiction of the courts apply as well to foreigners within a country as to citizens, there is another important exception of special interest to foreign trade, namely—the jurisdiction of the consular courts.

The great Powers have compelled a number of non-Christian countries, notably China

and the Turkish Empire, to grant full or partial exemption from their territorial jurisdiction in favor of the nationals of these Powers residing or traveling in those lands and in regard to the property of these nationals situated there. For example, China[1] has largely similar treaties with 18 or more of the Powers by which it is provided that a defendant is to be sued, not in the courts of the country, but in the court of his own nationality. The jurisdiction is mostly exercised by consuls at the various ports. The United States, through the efforts of Caleb Cushing, was the pioneer in securing such a treaty with China, and the United States and Great Britain have each established higher and federal courts in China, independent of their consular systems. These two higher courts exercise jurisdiction mostly at Shanghai, holding sessions at other cities when required.

Consular Courts

The long and eminent standing of the British Court and its wisely directed and wide-reaching efficiency, have well and effectively protected, regulated and promoted British interests in China. For the American courts

[1] See the article "Extraterritoriality in China," in the Annals of the American Museum of Political and Social Science, Volume XXXIX, January, 1912, page 97, by F. E. Hinckley, the district attorney of the United States Court of China.

appeals lie from the consular courts to the United States Court for China; from the latter to the United States Circuit Court of Appeals at San Francisco, and thence to the United States Supreme Court. These appeals are, however, rare. The most important and interesting opinion of the Supreme Court on one of these appeals, very enlightening as to fundamental principles of extraterritoriality, is that in the case, *In re Ross* (1890—140 U. S. 453, an appeal from the then Consular Court in Japan).

Consular Courts formerly existed in Japan, but following the reform of her laws and the introduction of modern Western methods and ideas, they were, as recently as 1899, abolished.

In Turkey and in other non-Christian countries, an extensive jurisdiction is exercised under treaty stipulation by American consuls in cases where American citizens are interested.

In Egypt, consular courts exercise criminal jurisdiction and also judge civil cases between foreigners of the same nationality. Jurisdiction in civil matters between natives and foreigners and between foreigners of different nationalities, is exercised by the international or mixed tribunals, which employ a code based on the Code Napoleon, with cer-

tain additions from the Mohammedan law. The Courts have both foreign and native judges, the foreigners being in the majority. Changes as to the condition of foreigners in Turkey and Egypt will probably result from the war.

Mercantile Courts

One frequent result of the distinction made in code countries between commercial and non-commercial affairs has been the establishment of special mercantile courts with exclusive jurisdiction over commercial matters. When these are well administered—especially where one or more laymen, practical men in commerce, sit with the judges—they are of great service to the mercantile community, often granting a more intelligent decision of disputes involving trade knowledge than the ordinary law courts could give, securing speedier enforcement of claims, and exerting a wholesome influence in maintaining high standards of mercantile honor.

In other countries again, as in England and in many of the states of our Union, while there are no commercial courts, special terms or parts of the ordinary civil courts are commonly devoted exclusively to commercial cases, in order to expedite decisions. In some courts preference is given commercial cases on the general calendar over other cases.

II

Traders and Acts of Commerce

MOST foreign legal systems draw a sharp distinction between traders and non-traders, between acts of commerce and non-commercial acts.

Traders are those who are habitually engaged in commercial dealings. With us, the question whether a man or company is or is not in trade rarely becomes of importance in court, except in connection with the bankruptcy law or in the interpretation of some special statutes. But in many foreign countries, it is a question that is very frequently raised. Lawyers have to answer it daily, for not only do traders have to comply with a number of special legal requisites (designed to give publicity to mercantile operations), but a man's rights, privileges, duties and obligations, the courts in which he must sue or be sued, may differ widely, depending on whether or not he is a trader, or whether the particular transactions in question are to be held commercial or non-commercial.

Who Are Traders?

As might be surmised, the line between trade and other pursuits, between mercantile

and so-called "civil" operations, is drawn differently by different codes and different interpretations drawn from the codes in various countries. If a man is conducting a retail shop or wholesale store buying and selling goods, it is universally answered that he is a trader. But where is the line drawn? Is a farmer selling his produce, or a mining company selling its ores, or a manufacturer selling his products, performing a commercial act? How about a hotel keeper—a boarding house keeper—a public hack driver —a steamship company? A bill broker, you can guess, is in trade. Is a stockbroker? If a real estate broker is a trader, what of the widow who sells the house left by her husband—is she performing a commercial act?

The answers to all these questions and to dozens of others that readily suggest themselves, vary in the different countries. Needless to say, the American exporter is vitally concerned with these answers. The credit he may be willing to grant a customer, or an agency he may be willing to confer upon a man abroad, or the nature of a contract he may make with him—such decisions turn upon the greater or lesser remedies or safeguards he may possess, or upon the interpretation to be placed on the contract.

It would serve no useful purpose to enu-

merate all the different answers given by codes and courts even in a few leading countries. Typical instances will suffice. The farmer or dairyman selling his produce is not performing an act of trade, but the dealer who buys from him is. Actors and the like are not traders, but theatrical managers are. The Italian Code and one or two of the more modern codes that have been influenced by it, in contradistinction to the codes following the French, make the dealings of a real estate operator acts of trade.

How Some of the Codes Differentiate

In Germany, state and municipal concerns carrying on industrial activities for gain, such as banks or railways or waterworks, are classed as industrial concerns. But mere gain is no test, for lawyers, doctors, and artisans and other persons whose industry does not exceed the scope of an ordinary petty concern are not in trade. Manufacturing and printing plants requiring a business staff are in trade, but not mere handicraft and building undertakings or farming and forestry. Certain legal persons rank as traders even though they pursue no trade or industry, such as joint stock companies, limited partnerships with share capital, registered partnerships, associations with limited liability. In France, all stock companies are in trade.

In many countries, the commercial code is applicable only to traders. In others it applies to any solitary transaction of a commercial character, even if one or both the parties involved are not in trade.

This system of separate civil and commercial codes and the artificial distinctions that flow from it, notably in the Spanish countries, have always seemed to American merchants and lawyers needless and embarrassing, causing hardship often on innocent parties and generally hampering trade. But as long as it exists, we have to recognize it and be prepared for it.

Duties of Traders

If a man is a trader, the commercial codes usually impose upon him very definite obligations which do not exist as a matter of positive law in this country, although some of them are firmly established in usage. It is generally the duty of a trader:

1. To be inscribed in the mercantile registry of the locality and publish the essential facts upon entering business or effecting radical changes.

2. To keep books of account and take inventories and balances at stated periods.

3. To keep letter-press books and to file the correspondence received by him.

4. To render accounts to his customers.

5. To give immediate notice of insolvency.

The details of these duties are prescribed with great particularity. Strict attention must be paid to see that they are rightly performed, if agencies or branches are being established in a foreign country.

Mercantile Registry

The mercantile registry is an institution in most foreign countries that exists in order to insure publicity of the essential facts as to the ownership or organization of a business. It is often under the direct control of the courts. We are familiar at home with the practise of filing papers in public offices as to corporations and limited partnerships and as to the carrying on of business under an assumed name. In most of the code countries, individuals and ordinary partnerships also must be registered, as well as powers of attorney, and notices of all changes, dissolutions and liquidations. Specimen signatures are often required to be filed.

As most documents that are inscribed in the registry pass before a notary, it is appropriate to call attention to the great difference between the position of notaries in foreign countries and in the United States.[1]

[1] In Louisiana, which has inherited French and Spanish law, notaries are more like those abroad.

Notaries

The notary abroad is an important public official, usually learned in the law and admitted, only after examination, under heavy bonds, and maintaining a permanent office, where he keeps his books and archives. Instruments are executed before him with great solemnity and with extreme precaution. The original instruments are not kept by the parties, as with us, but are recorded in the notary's books and there signed by the parties, witnesses and the notary himself; certified copies are given to the parties and are used in court. Nearly all important documents have to be thus treated, including deeds and mortgages and other instruments affecting real estate, contracts of partnership, articles of association, by-laws and minutes of stockholders' meetings, powers of attorney, etc. Notaries are also often intrusted with other functions (in addition to those familiar to us), such as guardianship and management of estates and the taking of testimony.

Special Classes of Traders—Brokers

Certain lines of business are, as a matter of public policy, often subjected to peculiar restrictions. In many foreign countries, in addition to laws of the type familiar to us at home intended to protect the public in relation to banking, insurance, transportation and the like, the commercial codes often single out

for special treatment, stock and produce exchanges, auctioneers, warehousemen and brokers. Of these, brokers alone require especial mention, as the operations of the others are more strictly localized.

In many countries, the position of broker is invested with almost the character of a public office, and brokers are appointed by the government. In France, for instance, stockbrokers are so appointed. All merchandise brokers were also government appointees until a generation or two ago, but today there are two kinds—the free brokers, who are simple traders, and the privileged brokers. The latter have the rank of public officers and enjoy a higher standing in the community. They have to be registered in the commercial court, for which purpose they must produce certificates of probity, evidence of business capacity, pay an enrolment fee and take oath to carry out with honor and integrity the duties of their business. Similar rules are followed in other jurisdictions—in many countries they are required to give bonds, and a person not registered as a broker cannot sue for his commission or brokerage.

Brokers are required by law to keep special day books, extracts from which must be given on demand, and to notify the parties to transactions immediately by means of

broker's bought-and-sold notes. When they make a sale by sample, it is their duty to keep the sample. They are prohibited from having any personal interest in the transaction, and usually, also, are prohibited from being directly or indirectly interested in any business of the kind in which they act as brokers. For infractions of these rules, brokers are liable not only for damages, but subject themselves to the risk of being stricken from the rolls and to criminal prosecution. If they fail in business, they are deemed fraudulent bankrupts and prosecuted as such.

Married Women and the Law

In most countries the restrictions which formerly existed on the power of married women to bind themselves by their contracts and to control their own property, have been to a large extent done away with in recent years. Husband and wife are no longer one, and that one the husband, as formerly. Caution is still necessary, however.

In Latin countries, generally, and in some others, the management of a wife's property (in the absence of an ante-nuptial contract or marriage settlement) is usually as a matter of law absolutely in the hands of the husband. In these countries, the system of community of property (known also in Louisiana and some of our western states) prevails.

Husband and wife form a partnership. Upon its dissolution by death or otherwise, the respective spouses or their representatives are entitled to get back the value of the property they originally contributed to the partnership, plus one-half of the profits and gains that have been made. The possibility of this relationship or similar limitations existing, must constantly be borne in mind in granting credit abroad, as creditors may sometimes find themselves subordinated to the rights of the wife in respect to property which they believed was their debtor's.

Married women may also be found in trade, and the question will arise as to the advisability of dealing with them. Even in the Latin countries, where women are still under disability, it is generally safe to do so. One must be satisfied, however, that they have been duly authorized. The French code and its followers provide that a woman may engage in trade with the consent of her husband. Once this has been obtained and she is actually engaged in trade, she can freely enter into contracts and dispose of her property without the special authorization of her husband, which otherwise is required.

Full age is usually fixed at 21, but in some countries as late as 25. In the common law, all contracts made by an "infant"—that is,

one under full age—except those for necessaries, are void or voidable. "Necessaries are goods suitable to the condition in life of the infant and to his actual requirements at the time of the sale and delivery."

Minors and Guardians

In the civil law countries, a characteristic difference from the common law is the greater extension given to the law of guardianship. Guardians may be either of the person (and are then called *tutors*), or of the property (in which case the term *curator* is used). The wards can generally act only through or with the concurrence of their guardians. In many countries, however, minors over 18 years of age can be emancipated—that is, be declared of full age or be allowed to engage in business, perform valid commercial acts or deal freely with their property—if they obtain the authorization or consent of the parent or person exercising the parental power and if the instrument of authorization is registered with the commercial court, or an order of the court obtained.

III

Partnerships and Corporations

MAN is a social animal in business as in other relations. It is necessary to combine capital and industry and to organize activity. This association or group activity for profit takes diverse forms, ranging all the way from the partnership of two friends or brothers in a small retail store to the gigantic combinations of steel or oil corporations encircling the globe.

In no branch of commercial law are there more striking differences between the common law and the civil law than in the treatment of these group activities.

One fundamental difference is that the law of most countries ascribes "juristic personality" or "legal entity" to a number of commercial organizations to which the law of England or the United States gives no recognition apart from the members composing them.

Juristic Persons

Business men the world over treat the ordinary partnership as a distinct and separate entity from the partners: they know and think of and deal with "the house" or "the

firm." But our law, as they find when they get into its meshes, does not agree with them. It does not recognize, except to a very limited extent, the "house" or "the firm." It knows the partners only as individuals. It is the partners ordinarily who must sue or be sued: it is the partners as individuals, not the firm, that own the property and owe the debts, and any change destroys the identity of the firm.[1]

Not so in the rest of the world outside the domain of the English common law. There a partnership is a legal entity, with a legal personality separate and distinct from the individual partners, just as a corporation has a separate and distinct legal personality apart from its officers, directors and shareholders. The "entity" theory of partnership, while it commands the respect of our jurists, has made little headway in our law. The same is true as to limited partnerships and voluntary unincorporated societies. In this respect, the rest of the world is a century ahead of us.

The forms of group activity or association

[1] A continuing guaranty given to a firm or in respect of the transactions of a firm, is, in the absence of an agreement to the contrary, revoked as to the future by a change in the firm, because of the fact that the change destroys its identity.

in business for profit recognized in the codes are generally three:

1. The general or collective partnership.
2. The limited or special partnership.
3. The form corresponding to our stock corporation, the *societé anonyme* of the French, *sociedad anonima* of the Spanish, *aktien-gesellschaft* of the German.

Three Forms of Group Activity

All of these are usually required to be constituted by public instrument before a notary public, registered in the mercantile registry, and an extract of the contract or articles of association published. This obviates the difficulty which often arises in English and American law of knowing whether or not there is a partnership.

In almost every country there are restrictions, in the interest of the public, on the use of names other than one's own or the name of one of the partners with the addition "and company." Sometimes such use is absolutely prohibited; sometimes it is permitted, especially when a preexisting business is continued, under requirements for filing or publication.

Provisions as to Firm Name

In the case of limited liability companies, it is commonly required to use the words "Limited" or "Incorporated" or their equiva-

lent; and in the case of limited partnership, some indication of the fact—as, for instance, the well-known "*S. en C.*" (*Sociedad en Comandita*) of Spanish-speaking countries—is often commanded.

General Partnership

Apart from the fundamental difference already noted, the partnership of foreign law does not differ radically from our own. The partners are liable jointly, or jointly and severally, for the firm's debts. The full extent of their private resources as well as the firm's assets are subject to the claims of creditors, and each of the partners has ordinarily power to bind the firm and his copartners as to firm matters.

It is customary in many countries, notably France, for the partners to elect one of themselves or an outsider as manager, with full powers to conduct the business. But, contrary to our law and as a result of the publicity given to the partnership agreement (which with us is usually kept private), a partner who is not given the use of the firm name cannot impose the usual joint-and-several liability upon the other partners. Precaution in this respect must therefore be exercised in dealing with a foreign partnership.

In addition to dissolution by expiration of

the term of the partnership, by bankruptcy or by common consent, a partnership is dissolved by the death of any of the partners. In most jurisdictions, however, it can continue with the heirs of the deceased partner, if the articles so provide, and the heirs are of age.

It may at times be advantageous for American traders to become partners in foreign firms. Upon any change in the partnership, especially upon retirement, they should exercise especial care to see that the formalities of public instrument, registration, publication and notice to creditors, necessary to prevent their liability for future operations of the firm, are complied with.

The joint stock associations of New York and other states (the express companies are familiar examples), although they issue stock, are simply elaborate partnerships, and the shareholders do not escape personal liability. On the other hand, they are subject to some of the disadvantages of incorporation—for example, they have to pay the annual franchise tax to the state.

So-called mining "partnerships" are not really partnerships at all, and special rules apply to them in nearly all countries where there is an established mining industry.

The special features of limited partnership

(barring the fundamental difference as to "legal entity" already noted) are the same the world over: that is, there is a general partner, or partners, liable without limit for the firm's debts, and a special partner, or partners, popularly called sleeping partners, who are liable only to the extent of their contribution. The latter must not take any active part in the management of the business or withdraw any part of their capital or allow their name to appear in the title of the firm; if they do, they render themselves liable as general partners. Likewise, if the original requirements for the formation of the partnership are not strictly complied with, full liability results.

Limited Partnership

A further development of this form of partnership, not recognized in the United States, is the "limited partnership with shares." The position of the general partners is the same here as in the simple limited partnership, but the interests of the special partners are represented by shares, which, barring any express provision in the partnership agreement, can be freely sold and transferred to outsiders. Provision is generally made for meetings of the shareholders and the election of a committee of inspection to exercise a limited supervision over and audit the accounts and transactions of the general

partners. This form of organization is frequent in Argentina.

A still further development is found in recent German law. The limited liability partnership (*Gesellschaft mit beschränkter Haftung*) issues no shares, but *all* the partners are exempt from liability beyond their subscribed contribution. It has no board of directors, but acts through business managers, and there may be a board of control. A recent commercial investigator[1] recommends this form as the simplest and best for branches of American enterprises in Germany.

Stock Companies or Corporations

Another difference between the civil and common law is in the theory as to corporations. In our law, the old theory survives, that men have no inherent right to form themselves into a legal entity or juristic personality, separate and apart from themselves as individuals. That is a privilege or franchise the state confers on them. In the code countries no sharp line is drawn between stock companies and partnerships. Men have the same natural right to join together in the one form of business organization as in the other. There are the same requirements in regard to essential publicity, although addi-

[1] Mr. Archibald J. Wolfe, of the Department of Commerce (Special Agents' Series No. 97—1915).

tional restrictions are imposed in order to protect the public against fraudulent issues of shares and the like.

The characteristic feature of a stock company, which gives it favor in the eyes of business men, is that in this type of organization the liability of each stockholder for the corporate debts is limited normally to the amount of his stock.

Code Countries Allow Greater Freedom

One result of the foreign theory that a corporation is very much like a partnership, and that the members or shareholders do not require any special grant or franchise from the state in order to organize and carry on their business, is this—that very much greater latitude and freedom is allowed as to the form of organization and manner of carrying on business and much more extended powers can be exercised. In the United States a corporation is hedged in by technical rules that unnecessarily incumber its operations and needlessly increase its expense of doing business. Not so, under the Continental system—a mercantile corporation can generally exercise and carry on without let or hindrance from the state all lawful pursuits that an individual or partnership can and with an equally free choice of methods.

Business corporations in the United States (I speak with especial reference to New York) are hampered in their foreign business to a wholly needless extent. For instance, if commission houses incorporate they can no longer deal freely in bills of exchange; they cannot enter into partnerships; continuity of policy and control cannot always be secured, as voting trusts or other roundabout devices are restricted; if they allow the credit balances of their customers to remain in account current and have frequent money transactions with them, they risk being called to task for receiving deposits and thereby being accused of violating the banking laws. Similarly, both business corporations and banks are prohibited by the corporation laws from undertaking mercantile banking operations in or with foreign countries—as do the English and Continental mercantile banks—and have to resort to circuitous means to attain the end at a duplication of expense.

In the code countries, business men can get together and form limited liability associations corresponding to our corporations with as great ease and simplicity as they can form a general partnership. In general, the only restriction is as to the paying in of capital, for the wholly beneficent purpose of protect-

ing the public; with us, on the other hand, desirable safeguards in this respect have been in abeyance and "watered stock" is the rule rather than the exception in our corporations. The formalities of organization are the same as in partnerships; the incorporators file with the notary their contract or articles of association (much simpler and costing less for legal fees than ours), and comply with the provisions as to mercantile registry and publication in the one case as in the others. Only when they desire to carry on some special business which the state deems it desirable to supervise or regulate more closely in the general public interest, such as insurance or banking, is it required that their organization papers be passed on and allowed by the authorities; at most, the allowance or authorization is granted as a matter of course, if the papers are in order.

Corporations in England and America

The English law does not differ substantially from our own, and we can treat the two together.

In England, the normal trading company is a joint stock company with limited liability. It corresponds closely to our familiar form of business corporations. The incorporators subscribe to a memorandum of association, which states the name (with the addition of the word "limited"),

the location of the registered company, the objects for which it is organized, a declaration that the liability of the members is limited, the amount of normal or, as we call it, authorized capital, and its division into shares. In the actual draft of the certificate of incorporation, it is the "*objects*" clauses that require the most careful attention, for they lay down the entire scope of the company's authorization. They constitute the contract not only between the subscribers, but are binding on all subsequent shareholders, and knowledge of their contents is presumed as to third parties. The effect produced by a company going or attempting to go outside its charter powers, raises some of the most difficult questions of corporation law. Such acts are called *ultra vires,* and in many jurisdictions are absolutely void.

The articles of association of an English company correspond to our by-laws and govern the internal management of the company.

The English law is much stricter in holding promoters to a fair course of dealing with regard to the corporations which they organize and the rights of subsequent shareholders than is our law. If shares are to be offered for subscription, a prospectus has to be publicly filed, which must contain a full disclosure of all the dealings of the promot-

ers with reference to property taken over by the company or contracts made with it. In the code countries, too, fraudulent promotion is generally dealt with severely, and the rights of stockholders are well protected. There is less cumbersomeness, delay and expense also, than in the United States, in connection with corporate reorganizations, which are usually conducted by the courts.

IV

Laws Affecting Interstate and Foreign Commerce and Monopolies

OF governmental agencies in the United States affecting trade activities, the most important heretofore has been the Interstate Commerce Commission, which exercises large powers, conspicuously in the regulation of railroads. Its authority is not, however, confined to railroads, but extends to all interstate and foreign carriers and to some other matters.

In addition to the various state statutes, the most important legislation in the United States on the subject of monopolies and combinations is the Sherman Anti-Trust Law, than which there is probably no law that is better known by name and no law as to whose operations there has been more doubt.

Monopolies and Combinations

The effect of the first and second sections (the fundamental ones) of the Sherman Law may be summarized in the words of the Chief Justice in the Standard Oil case, as follows:

> In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract,

> combination, etc., the second section seeks, if possible, to make the prohibition of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraint of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such result are attempted to be brought about, or are brought about, be not embraced within the general enumeration of the first section.

The statute, therefore, covers attempts at monopolization by an individual, as well as by a concert or combination of individuals or a corporation or corporations.

It was largely dissatisfaction with the state of the law as to the combination of capital, that led to the enactment of the Federal Trade Commission Law in 1914, and almost simultaneously therewith, of the Clayton Act, designed to make more definite the prohibitions against unlawful combinations and restraints of trade.

Federal Trade Commission

It is believed by many lawyers, who have given careful study to it, that the Trade Commission Law does not add to or subtract from the fundamental rules of the Sherman Law, but all that it does is to create supplemental remedies and additional machinery for the enforcement of the intention of the Sherman Law.

The Federal Trade Commission has been in existence too short a time to have had as yet much influence on the development of the law or on actual business conditions of either domestic or foreign trade; but it is devoting careful attention and much patient and scientific work in carrying out the power given to it "to investigate from time to time trade conditions in and with foreign countries where associations, combinations or practises of manufacturers, merchants or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable." It therefore behooves every exporter to keep well posted as to its activities.

The Clayton Act

By the Clayton Act, the following acts or courses of dealing are expressly specified and made unlawful: [1]

1. Discrimination in price, where the effect may be to lessen competition substantially or may tend to create a monopoly in any line of interstate or foreign commerce.

2. "Tying contracts," that is, contracts requiring a dealer to buy all of his goods or

[1] Only general rules are given and the many exceptions, provisos and limiting clauses are omitted; these all give rise to numerous doubts, the only certainty in connection with them being that protracted litigation will ensue.

machinery of a certain kind from a particular vendor to the exclusion of all goods of competitors.

3. The holding of stock by one corporation in another corporation, when the effect thereof *may be* to substantially lessen competition or to restrain interstate or foreign commerce or tend to create monopoly.

4. Interlocking or common directorates.

The Federal Trade Commission is given authority to enforce these prohibitions. Until this act has passed through the courts, one can speak only with hesitation regarding it, but it would seem to raise some very curious questions of especial interest to the export trade. For instance, the section against price discrimination is limited to commodities sold for use, consumption or resale within the United States, its territories, possessions, etc.

Sales by a manufacturer to a commission house or export jobber are ordinarily not made for use, consumption or resale within the United States, etc. Can a manufacturer (who is trying to lessen competition) lawfully discriminate in price between different commission merchants and jobbers in, let us say, New York City? Each particular transaction would seem to require consideration on its own facts: if the exporter ships to a foreign country, say Cuba, and the circum-

stances of the resale by him to his customer are such as would lead the courts to hold that the sale was in New York, the manufacturer's discriminating sale to the exporter would be unlawful; if, on the other hand, the resale were deemed to take place in Cuba, e.g., as a result of a contract made by the exporter's office in Cuba and delivery and payment there, the manufacturer's sale to the exporter would be lawful. Again, it would seem that, so far as this law is concerned, it is lawful for a manufacturer or exporter to monopolize in Cuba, but not in Porto Rico; in Panama, but not next door, in the Canal Zone.

A Defect of the Sherman Law

One of the generally admitted defects of the Sherman Law is the fact that its sole enforcement was lodged with the Department of Justice of the United States. A private individual could sue for damages only after his ruin was practically complete. The Clayton Act opens the courts freely to individuals who are wronged or injured by unlawful combinations. They may obtain relief by injunction to prevent threatened loss or damage by a violation of the anti-trust laws.

Section 5 of the Federal Trade Commission Law declares unfair methods of competition in commerce to be unlawful, and empowers and directs the commission to prevent

the use of such methods. Unfair competition in this sense undoubtedly means more than mere marketing of goods by methods involving frauds or misrepresentations. "Rather is this clause intended to stamp out those classes of acts which, for want of a better term, may be described as economically unfair." (Prof. W. H. S. Stevens, Annals of the American Academy of Political and Social Science, Volume LXIII, January, 1916, page 37.) The same writer distinguishes twelve forms of unfair competition, namely—local price cutting, operation of bogus independent concerns, special competitors' devices, conditional requirement, exclusive sale and purchase arrangement, rebate and preferential arrangement, acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process, manipulation, black list, boycott, white list, etc., espionage and intimidation, etc., interference with contracts and business of competitors.

V

Doing Business Abroad

NOWADAYS, by virtue of the general law or of treaties, foreigners may freely pursue trade and industry in a country and have the right to the same means of legal protection as natives. To the general rule, there are certain limitations:

1. Reciprocity is sometimes required.

2. Exception is sometimes made in regard to certain branches of commerce or industry.

3. Particular requirements are usually exacted of foreign corporations and frequently of foreign partnerships.

Let us suppose that an American company seeks to carry on business in foreign countries. The way in which it shall do so is primarily a matter of business policy, not of law. There are ordinarily four mediums:

1. "Agencies," popularly so-called.

2. True agencies.

3. Branches of the firm or company.

4. Subsidiary companies, which may be organized (a) in the United States, (b) in the foreign country.

The Agency

When business men ordinarily speak of an "agency," they may mean either one of two kinds of relations which are very different legally. True agency requires the relationship of principal and agent (see Chapter VI). A manufacturer may talk of granting to a man in Brazil an exclusive agency for his goods, when in reality the man is not an agent at all, but simply a purchaser of the goods under a contract excluding competitors in his territory. In such cases, there are no formalities abroad which our home company has to look out for. It is not "doing business" abroad in such a sense as to bring it under any requirements for registration and licensing. The so-called "agent" trades for his own account. It is ûp to him to comply with the law; whether he does so or not is no concern (credit apart) of our American company. Nor need our company bother with local requirements where goods are shipped on consignment to a commission house, even where the commission house solicits and sends in special orders, so long as the commission house is dealing in its own name. But the operations of commission houses are likely to vary, and they sometimes perform acts of true agency, which make it advisable for our American company to acquire a legal footing in the country.

Such legal footing is nearly always necessary in the case of true agencies, branches and subsidiary companies. We are accustomed in our interstate business to the requirements that a corporation of one state must obtain official authority to do business in another state. *In the case of foreign countries, such authority is often required not alone for corporations, but also for partnerships.* American firms in the export trade are frequently ignorant of this, until they learn it by costly experience.

Permanent Agencies and Branches

There is very little difference in the requirements usually imposed on permanent agencies and on branches of the home company. In addition to or as a part of the requirements for native companies in connection with mercantile registry and publication, our American company will usually be required to file, in order to get a proper legal footing, the following:

1. A copy of the articles of agreement, if a partnership, or of the certificate of incorporation.

2. A copy of the by-laws.

3. A power of attorney to some one resident in the country to represent the firm or company. Sometimes very full powers must be given.

All these documents must be certified by the proper state authorities of the home country and by a consular or diplomatic official of the foreign country. Translation into the language of the country, sometimes by an official interpreter, is required.

In many countries, one or more of the following requirements are added:

4. A certificate from the consul or some other proof that the company is duly constituted and authorized at home.

5. A copy of the minutes of the meeting organizing the company or authorizing the establishment of the branch or agency. The capital to be devoted to the business in the country must sometimes be stated.

6. Proof that a required proportion of the capital has been paid in.

7. Payment of a special tax and security by way of bond or undertaking for payment of future taxes. Sometimes a resident representative personally responsible for future taxes and satisfactory to the Government must be designated. In the case of banking or insurance companies, investment in the country or deposit of securities is generally required.

8. Publication in the Official Gazette or general newspapers.

9. In many Latin-American countries, the

final step in the proceedings is the issuance, and publication in the Official Gazette, of a decree by the President that the company has duly complied with the requirements and is authorized to act as a juristic person and have a legal domicile in the country.

Subsidiary Companies Organized at Home

It is often advantageous, or sometimes a matter of legal necessity, to organize a new subsidiary company to carry on the business in the contemplated country. If organized here in the United States, the requirements in the foreign country are substantially the same as those set forth for a branch.

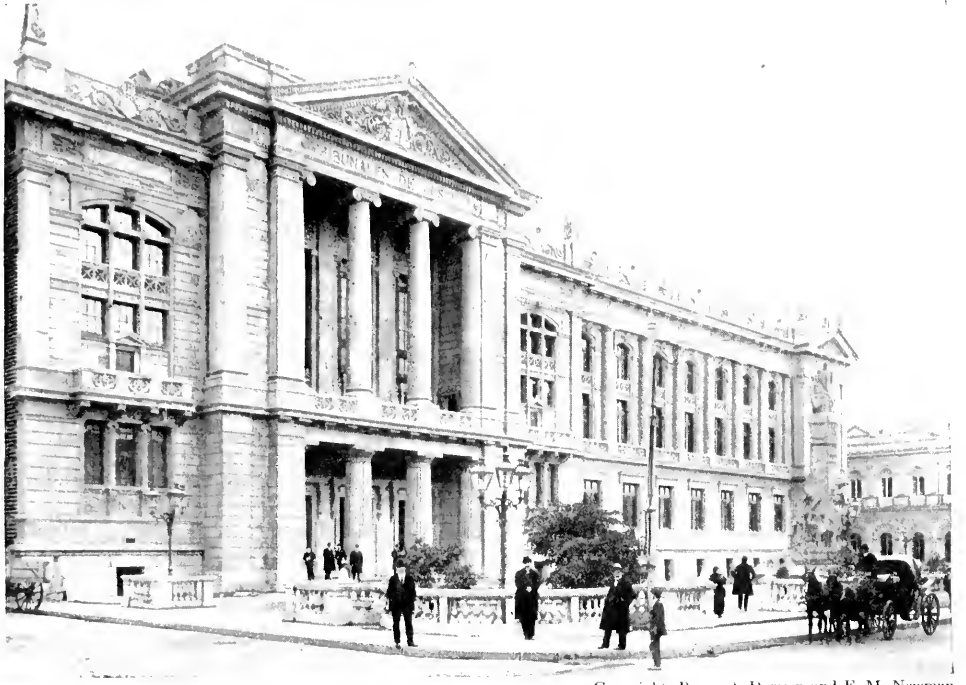
A lawyer familiar with the foreign requirements should be considered *before* organization—and not merely for filing the papers abroad after incorporation has been had. Sometimes, authority to do business follows automatically from the filing of the papers, publication and compliance with other requirements. In many countries, however, the grant of authorization lies more or less in the discretion of the authorities.

They will sometimes reject a foreign corporation, either with or without authority of law, because its charter does not comply with the laws applicable to domestic corporations. Let me give two recent instances.

A West Virginia corporation was refused admittance to Colombia because its charter provided that its duration should be perpetual; Colombian law requires that corporations be for a limited term. An English company was refused admittance in another South American country because its articles contained provisions as to decrease of capital stock not consonant with the local law. In both cases, it was more than doubtful whether the laws in question were applicable to foreign companies, but it was cheaper and quicker to amend than to test the question in the courts.

One other point deserves mention. In Italy, companies organized abroad which have their real head office and the principal activities of their undertaking in Italy are considered for all purposes as Italian companies, and are subject, even as regards the form and validity of their articles of organization, although entered into abroad, to all the provisions of the Italian Commercial Code. The same rule is followed in Japan, Portugal and elsewhere. The object is to prevent undue advantage accruing to a company formed in another country in order to escape the provisions of the local law.

There are often decided advantages, not only in the way of taxation or government



THE IMPOSING COURT HOUSE AT SANTIAGO, CHILE

Legal advice should be sought before establishing permanent organizations in foreign countries.

subsidies but also of powers, to be gained by organizing within the country where business is to be carried on. For certain special activities, it may be essential. The laws frequently prohibit banking or insurance or public services from being carried on by any but national companies; and there is hardly a branch of industry—outside of common merchandising—that in some country or other is not restricted to citizens or domestic companies. Usually, ownership of stock by foreigners, whether resident or not, is freely allowed: and some countries make special provisions in their corporation laws for protecting the interests or facilitating the convenience of foreign stockholders. Argentina, for instance (Arts. 358, 359 Commercial Code) provides:

Subsidiary Companies Organized Abroad

> Art. 358. When a stock company has shareholders residing in a foreign country, who own at least twenty-five per cent. of the subscribed capital, they shall have the right to hold meetings to examine the accounts and reports of the directors and syndics and to appoint one or more to represent them at the regular meetings of stockholders, in which they shall have as many votes as under the by-laws belong to the said foreign shareholders so meeting.
>
> In such case, they shall elect a chairman to receive the respective copies of the reports and ac-

counts which it is the duty of the head office to transmit in due time, to call meetings and to carry on correspondence with the head office.

The foregoing provisions are without prejudice to the exercise by the stockholders of their rights individually, if they do not wish to proceed collectively pursuant to this article.

Art. 359. Except as provided in the preceding article or by provision to the contrary in the by-laws, shareholders residing in a foreign country are in every respect on a parity with those residing in the Republic.

Once a company has duly obtained proper legal footing in a country, care must be taken to insure that it maintains itself in good standing. Among other matters to be specially looked out for are: payment of taxes, filing of reports, continued presence of the representative or agent, and appropriate proceedings (by way of filing, registration, publication, etc.) whenever there is any change of importance in the organization of the company. In general, any change in regard to any of the facts originally set forth must be noted in the same manner.

VI

Agencies, Commission Merchants and Powers of Attorney

THE main principles of the law of agency seem to be the same in all the civilized countries of the world. Like the fundamental principles underlying contracts, they are to be found in foreign countries in the civil code, not in the commercial code which deals in general only with certain special instances of agency, notably with commission merchants.

The relation of principal and agent can arise either by express or implied contract and the authority can be written or oral. As a matter of practise, in foreign relations, the authority will nearly always be written, and in important affairs will, so far as third parties are concerned, take the form of a power of attorney.

The subject presents two main aspects: the relation between the principal and the agent, and their reciprocal duties: and the relations between them and third parties.

Duties of the Agent and Principal

It is the duty of the agent:

1. To execute the orders of the principal

and to adhere faithfully to instructions. If he have no specific instructions, he must follow the accustomed course of the business.

2. To exercise the skill employed by persons of average capacity similarly engaged and the same degree of diligence that persons of ordinary prudence are accustomed to use about their own affairs.

3. To keep his principal informed of his doings and give him reasonable notice of whatever may be important to his interests.

4. To render his accounts to his principal without concealment or overcharge.

5. To be loyal to the principal: he must therefore refrain from placing himself in any position where his interests are in conflict with the interests of the principal, e.g., he may not directly or indirectly buy for his own account his principal's property or sell his own to him.

It is the duty of the principal to the agent:

1. To give him compensation, commonly styled commission. By misconduct the agent may forfeit his right to the commission.

2. To indemnify him against the consequences of all proper acts done by him in the execution of his agency.

3. To reimburse him for all advances and expenditures properly made in carrying into effect the agency.

The agent has a lien for his commission and advances in and about the property of his principal intrusted to his possession. Factors have a *general* lien upon any and all property of the principal in their possession and upon the price of what they have sold and securities given therefor; certain other agents are also given general liens, but as a rule the lien of an agent is a *particular* lien only, i.e., confined to the particular goods (or their proceeds) in regard to which he rendered the services or made outlays.

Relations to Third Parties

The characteristic legal feature of agency is that the principal is bound as to third parties by the acts of the agent acting within the scope of his authority. If Jones, as agent for Smith, makes a contract with Brown, the law looks upon it as a contract direct between Smith and Brown; Jones drops out, and barring special circumstances, is not personally liable. In England, however, as a general rule, the agent of a person resident in a foreign country is personally liable upon all contracts made by him for his employer, whether he describe himself in the contract as agent or not, this being the usage of trade, and it being presumed that the credit was given to him and not to his principal; but this presumption may be rebutted by clear proof of

a contrary intention. In the United States, this is no longer the rule, and an agent for a foreign principal now stands upon the same grounds as one acting for domestic employers.

Vexatious questions frequently arise as to whether an agent is or is not acting within the scope of his authority. The German law, followed in some other countries, avoids some of the difficulty by providing for a special form of agency, called *prokura* (power of procuration). It applies only to traders or trading companies. The scope of authority of an agent by procuration is defined by law. Managers and confidential clerks can thus act for their principals, without giving rise to doubts as to the scope of their authority. We confer similar powers, but their scope depends upon special circumstances in each case, and is generally unknown to third parties.

The chief difference between the Anglo-American and the civil law is in regard to the doctrine of undisclosed principal.

Undisclosed Principal

If Jones makes a contract in his own name without disclosing that he is really acting for Smith, Jones is, of course, personally liable, and can also enforce the contract. But how about Smith—can the contract be directly enforced by or against him? The Anglo-American law in general

answers, yes; the civil law, more formal, in general says, no. The Spanish Commercial Code, which we may take as typical of the Civil law, states:

> Art. 246. When an agent transacts business in his own name, it shall not be necessary for him to state who is the principal, and he shall be directly liable, as if the business were for his own account, to the persons with whom he transacts the same, said persons not having any right of action against the principal, nor the latter against them.

Commission Merchants

Commission merchants are subject to the general rules governing agents. When they receive goods for sale, they are in our law called "factors." Some special rules have grown up in regard to them based on usages of trade. We have already noted that they have a general lien. This lien operates to protect them against unpaid drafts drawn and accepted in the course of the agency. They are, for most purposes between themselves and third persons, to be considered as the owners of the goods. As against the principal, however, they have no right to pledge the goods—except for advances or reimbursement, to pay customs duties or other trade charges, or otherwise to raise money for him. It is customary for them also, in consideration of an ex-

tra commission called *del credere*, to insure to the principal not only the solvency of the purchaser but the punctual discharge of the debt.

Contracts with commission houses do not need any special formalities; ordinary commercial correspondence is sufficient. But in the case of other agents, or when the commission merchants are asked to act as special agents outside of the regular routine, it is customary, usually advisable, and frequently essential, that a power of attorney be executed.

Powers of Attorney

A power of attorney is the formal instrument by which an agency is created or the powers of the agent defined. It is frequently held that the powers of an agent are to be determined according to the law of the place where he is to exercise such powers. This rule is applicable whether or not the extent of the powers under such law is greater than that conferred by the law of the country in which his principal resides and in which he executed the power. When a power is executed by a partnership or corporation, there must be in the instrument evidence (that will be deemed satisfactory in the country where it is to take effect) that the person signing the instrument has the necessary authority to

bind the firm or corporation on whose behalf he is acting. An affidavit or a certificate by the notary is often insufficient. It will therefore be seen how important it is to consult a lawyer familiar with the laws of the country in which the power is to take effect.

In commercial and legal practise, few problems call for the exercise of such good judgment as the extent of the authority to be conferred on an agent abroad. On the one hand, it is dangerous to intrust him with too much power. He may abuse it with intent to defraud, or in good faith commit errors of judgment; and in either event, loss or disaster may be caused to the principal. On the other hand, he must be given sufficient power not only to meet the expected purposes, but to cope with emergencies and unforeseen contingencies. Delays awaiting mails may be dangerous. We have seen, too, in the previous chapter, that corporations are often required to have a representative with very full powers in order legally to transact business in a country.

It will often be found wise, therefore, to intrust one's full general power not to the commercial representative who will actually handle the details of the business, but to a banker or lawyer of high standing, with power to delegate to the commercial man.

This will provide a suitable check on fraud and misjudgment.

Although it is sufficient as a rule to comply in external formalities with the laws of the place of execution, it is generally preferable to draw up the power in the language of the country where it is to be used, and in accordance with the customary form there.

Termination of Agency

In dealing with an agent, it is important to ascertain not only whether his proposed acts are within his authority, but whether his power of attorney is still alive. The agency may be terminated in dozens of events, and all possible ways are not always scientifically covered by the codes. Death or incapacity, express revocation, bankruptcy, resignation—any of these may terminate the agency, and mere lapse of time may do so, even in countries where revocations under the law should be registered. If the power is an old one, confirmation should always be obtained.

If you are the principal and revoke a power given to an agent abroad and want to avoid possible trouble, you should exercise great care to see that the revocation is entered on the public records and publication of the revocation made; it is also desirable to give notice to all persons who have dealt, or are likely to deal, with the agent. The law of

foreign countries may take an unexpected slant. Here a third party deals with an agent at his peril. If the agent's powers have been revoked by operation of the law or by act of the principal, the third party must stand the loss if any ensues. In other countries, if the third party is acting in good faith, ignorant of the termination of the agency, the former principal who has reposed faith in the agent and armed him with a weapon which may inflict injury on innocent third parties, is the one to stand the loss.

VII

Sales

IN discussing the topic of this chapter, we must first of all make a distinction between the agreement to buy or sell a thing in the future and the consummated sale. The first is merely a contract. The second is something more. It is a contract carried out or executed by a transfer of the property, of the ownership of the thing. The essence of it is a *present* transfer for a price; although the price may be payable either immediately (as in a "cash" transaction) or in the future—that is, the sale may be on credit.

As to the contract, both the unwritten law and the codifications usually allow the parties the utmost freedom—they may make whatever stipulations they please and no particular formalities are necessary. The most common restriction is the provision that if the price be above a certain amount, the contract, in order to be enforceable in court, must be in writing, unless there has been a partial delivery and acceptance or part payment. This is known in our law as one of the rules of the Statute of Frauds.

Formalities

It has its counterpart in the legislation of a great many countries. Restrictions on the sale of a dealer's entire stock in trade ("sales in bulk"), by way of requiring formalities of recording or notice to creditors, are often found. In some foreign countries, notice of the intention to do so must be published in newspapers. If the formalities are not complied with, the sale is a fraud on creditors and can be upset. Of course, the general rules governing illegality of contracts apply to sales, and revenue and license laws or special prohibitory statutes have to be looked out for, as they occasionally make a contract of sale illegal or at least unenforceable.

The law in regard to sales is mostly concerned with laying down rules for contingencies that the parties did not have in mind at the time of entering into the contract or in regard to which they have made no express provision or which are not definitely governed by local trade usage. It is obvious that too much care cannot be given to the work of drafting general forms and blanks for orders and contracts for sale. To cover all points clearly but concisely requires trained business skill.

The chief difference between the English and the civil law on this subject is in regard to conditions and warranties. A breach of a

warranty does not give the buyer the right to return the goods, but only to claim damages. If, however, a condition is not complied with, he can return the goods. An English writer (Chalmers) gives the following illustration: Suppose a man buys a particular horse which is warranted quiet to ride and drive. If the horse turns out to be vicious, the buyer's only remedy is to claim damages. But if instead of buying a particular horse, he applies to a dealer to supply him with a quiet horse, and he gets a vicious one, the stipulation is a condition. He can either return the horse within a reasonable time or keep it and claim damages.

Conditions and Warranties

It is of course a matter of interpretation of the contract whether a stipulation is a condition or a warranty: and the interpretation is often hard to make.

The civil law in general makes no distinction between conditions and warranties. The buyer can rescind a contract for breach of a promise of warranty, and in many of our American states the technical English law has been greatly modified.

The old English law also laid down the rule *caveat emptor*—"let the buyer beware." The buyer took all the risks. The complexity of modern commerce has necessitated a

modification of this harsh rule, though it still survives more or less in several of our states. But the law now generally *implies* certain conditions and warranties, notably: (1) that the seller has the right to sell the goods, (2) if goods be ordered by description, they must correspond to the description, (3) if goods are ordered for a particular purpose and the buyer relies on the dealer's skill and judgment, they must be fit for that purpose; or if the purpose was not disclosed to the seller, they must be of merchantable quality, (4) in case of a sale by sample, the goods must correspond to the sample.

Caveat Emptor—Implied Warranties

The civil law does not recognize the rule *caveat emptor*—the seller is held to warrant title and quality. He is held to a much stricter liability for latent defects than in our law. If he fails to perform any *material* part of the contract or if the goods turn out to be defective, the buyer can within a reasonable time either reject the goods, or retain them and claim a reduction of the price. For certain staples, the usage of exchanges in adopting standard grades may limit the right to reject. And as far as title is concerned, even if the parties expressly stipulate there shall be no warranty, the seller is bound to return the money he received in

payment, if the buyer is dispossessed. This is the French rule, generally followed. It does not apply if the sale expressly related to a disputed right or claim.

Express Warranties

So far as express warranties or guaranties are concerned, great care should be exercised in the wording of the agreement. It is a safe rule never to make any statements or representations that you are not willing to live up to—not merely to the letter of the agreement, but to any reasonable interpretation that your foreign customer may put on them. It is a poor business policy that will hold itself only to strict *legal* liability according to the home laws that interpret the words. In order to have satisfied customers, the interpretation that may be placed on the language abroad, according to the laws and customs there, is an important factor to take into consideration. It is axiomatic that the psychology of the foreign customer must be studied. What we might think a peculiar twist may find ample justification in his own laws and usages.

Even from the legal aspect, the possibility of unfounded or even well-founded suits arising from an interpretation different from that of our home law must be borne in mind.

Another important difference between the law of some of our states and the general

run of foreign law relates to the effect of acceptance of the goods by the buyer on any claim he may have for defects. In some of our states, it has been held that taking the goods indicates an assent to accept them in full satisfaction of the seller's obligations as to quality. The Uniform Sales Act, which has been adopted by a few states, modifies this rule and brings the law more in harmony with that of foreign countries. Abroad, it is generally the rule that acceptance does not involve a release of the seller's obligation, at least if the buyer expressly gives notice of his claim as soon as the defect is discovered.

Effect of Acceptance

The subject is of such practical importance, that perhaps it will be well to give further brief statements as to the law in one or two countries.

In France, rescission of the contract is allowed broadly as a remedy for breach of any mutual obligation. The seller insures against latent defects, though he did not know of them, and the buyer has the choice of returning the goods, if there are defects, or of keeping them and paying only a fair part of the price, to be fixed by arbitration. The French law is widely followed.

By the German Commercial Code, if goods are sent from another place, prompt exami-

nation must be made and immediate notice of defects given. Failure to do this is conclusive in regard to visible defects, and notice of latent defects must be given as soon as the defects are discovered.

By the Argentine Commercial Code, the buyer has to examine the goods for *visible* defects and give notice within three days; the seller's liability for *latent* defects persists only for a reasonable time, which is determined by the court, but never longer than six months. Claims for defects under the contract or for inferiority of quality must always be determined by expert appraisers.

Of course, all these rules are subject to be varied by express agreement of the parties.

Risk of Loss

Important questions arise in determining the time when the transfer of title, which is the purpose of the sale, takes place. The parties rarely make any express agreement in regard to this. Business men think in terms of deliveries, not of the transfer of the legal title. When all goes smoothly, it does not make much difference; but when things go wrong, the determination of this question is vital. Upon it, turns the answer to the question who shall bear the risk of loss, the buyer or seller, if the thing is destroyed or damaged or deteriorates.

The law of all countries provides that the

THE PALACE OF JUSTICE, BUENOS AIRES

The Argentine Republic has made remarkable progress in the field of law as well as in commerce.

owner must bear the loss—but we have to determine who is the owner. Also, the rights of creditors of the seller or the buyer to attach or levy on the goods turn on the same question; they can levy only on property owned by their debtor, not by a third person, so again we have to know who is the owner.

The foreign law in general provides that title passes only on *delivery* of the goods to the buyer, or on inscription on some public record of an instrument transferring title—such as a bill of sale made in the notary's books. Sometimes, however, title passes when the bargain is made (France) if the thing sold is definitely ascertained. Delivery is not necessarily a physical handing over of the goods: it can be made by transferring the documents of title, such as warehouse receipts or bills of lading; or by delivering the keys of the place where the goods are stored; or by the buyer placing his mark on the property.

In many foreign countries, importance is placed on the invoice—it is considered a document of title, just as warehouse receipts and bills of lading are with us. Delivery and receipt of the invoice transfers title. Consequently the seller is bound, as a matter of law, to furnish on demand, an invoice, and to note thereon a receipt of full or par-

tial payment, as the case may be. With us an invoice, standing alone, is never evidence of title.

Formal bills of sale are not common in ordinary commerce, either here or abroad; and the Anglo-American law does not make delivery the turning-point to the same extent that the civil law does. Rather, we say, title passes when the parties intend it to pass. But the trouble is that the parties don't express their intention—if they did, there would be no trouble—so the law lays down rather elaborate rules to ascertain what their presumed intention is.

Intention the Governing Factor in Common Law

Delivery is evidence of intention to transfer the title, but is not conclusive. Property is presumed to pass when the seller delivers the goods to a carrier for the purpose of transporting it to the buyer; but even here the seller may reserve the right of possession or property. He may have the bill of lading specify that the goods are deliverable to him (the seller) or to his agent; or, if the bill of lading specifies that the goods are deliverable to the buyer or his agent, the seller may retain the bill of lading; by either of these methods the seller can reserve a right to the possession of the goods.

In cases where the seller draws on the

buyer for the price and transmits the bill of exchange and the bill of lading to secure the buyer's acceptance or payment of the bill of exchange, it is incumbent upon the buyer to return the bill of lading if he does not honor the bill of exchange. If he wrongfully retains the bill of lading, he acquires no added right thereby. At the same time, rights of bona fide purchasers acquiring on the strength of the bill of lading are protected.

Unascertained Goods Sold by Description

When the goods are unascertained and sold by description, title does not pass until they are ascertained. If a grocer agrees to sell you a barrel of flour, he can give you any barrel of flour from his store: title does not pass until the particular barrel has been "ascertained" and set aside for you in a conclusive way—in such a way that he has no longer a right to change it. If he starts to deliver it in his wagon and suffers an accident on the way, he has to stand the loss. But if you send your expressman for it, who receives it from the grocer, the loss is yours. As long as the goods are in the grocer's wagon, they have not been "unconditionally appropriated" to you, as the law phrases it; once they have been so appropriated, however, they are yours.

On the other hand, if you go into the store and say "I buy this particular barrel of flour and I'll send my man for it"—title is held to pass to you immediately—and if the store burns down and your barrel goes up in smoke, you have to stand the loss.[1]

The same underlying principles apply to transactions on a larger scale. In the overseas trade, it is of the utmost importance to determine when title passes and when, consequently, the risk of loss shifts from seller to buyer. Upon the determination of that question, turns the very practical question as to who shall insure the goods, the buyer or the seller. Furthermore, if the seller's interest in the goods ceases upon shipment here, he need only arm himself with proof that the goods were shipped in good condition; unless, of course, he expressly guarantees sound arrival. On the other hand, if title is not to pass until arrival at destination abroad, it may be very important for him to provide some check on unjustified rejections and on fraudulent or exaggerated claims that the goods have arrived in damaged condition.

[1] But if title is not to pass immediately and the goods perish without the seller's fault, the contract is avoided. There are some marked differences between the foreign law and our own in cases of mere *deterioration* not amounting to total loss.

Some exceptions to the rule that the risk is in the owner may be mentioned. In cases where delivery has been made to the buyer or a bailee for the buyer, but the property in the goods has been retained by the seller merely to secure performance by the buyer, the goods are at the buyer's risk. Where delivery is delayed by fault of either buyer or seller, the goods are at the risk of the person in fault as regards any loss which might not have occurred but for such fault.

Exceptions to General Rule

In conditional sales, although the seller retains title, the risk is in the buyer—so that if goods are properly shipped to the buyer, who is named as consignee in the bill of lading, the risk of loss and deterioration is upon the buyer. This is so even though the bill is an "order" bill and negotiable, provided the buyer is named as consignee. It is true that the seller by retaining the possession of the bill may prevent the buyer from obtaining the delivery of the goods. The situation is similar when an order bill is taken by the shipper in his own name and indorsed. It is also true when the goods are consigned to the seller or to a third person (e.g., a banker who finances the transaction)—the situation then is analogous to a conditional sale, the real beneficial interest is in the buyer

and title is retained only as a matter of security for the price.

Delivery

Questions as to the time and place of delivery need not detain us, for in practise the points are invariably definitely covered in foreign trade contracts. The trader who is negligent in regard to these simple points would be little benefited by knowledge of the law. Points of interpretation of contracts as to time and place are also usually well covered by the customs of the trade.

For instance, delivery in a specified month means that a good delivery can be made at any time during the month up to and including the last day. Such usages are given full effect by the law. However, if time is intended to be of the essence of the contract this should be definitely understood, for the laws differ greatly as to whether and when delay in delivery will justify the rescission of the contract and rejection of the goods. The rules for damages entailed by delay in delivery also vary exceedingly. Damages for such delay may be waived altogether by an acceptance of the goods. In some countries the buyer has the option to reject the goods or to accept them and claim damages for the delay.

Two further questions are of particular

interest: the remedies of the buyer or seller in case the other refuses to carry out the bargain, and the right of the seller on credit to protect himself for the price.

Three Remedies of Seller

The usual American rule is that when the buyer wrongfully refuses to take the goods the seller has the choice of three remedies: (1) he may sue for the purchase price, holding the goods at the disposal of the buyer; (2) he may resell for account of the buyer, holding him liable for the difference between the original purchase price and the resale price; (3) he may bring an action for damages for non-acceptance, the usual measure of damages being the difference between the contract price and the market or current price at the time the goods ought to have been accepted.

In England the second remedy is not allowed, nor is it in all of our states nor in all foreign countries. In a great many civil law countries, certain preliminary notifications by the court or a notary are necessary, in order that the seller's rights or options may be enforced; and often it is either necessary to bring the goods into court, and have them disposed of only by court order, or to sell the goods at public sale.

Our American law also differs from the modern English law and the law of most foreign countries in regard to the buyer's rights when the seller refuses or fails to make delivery. In the United States, he has usually only these alternatives: (1) a right of damages for the loss naturally resulting, the measure of damages being presumably the difference between the contract and the market price at time for delivery; it is not necessary for him actually to replace the goods; or (2) he may treat the contract as rescinded and recover the price or any part of it that he may have paid.

Remedies of Buyer

Under the modern English law, in the few states where the Uniform Act has been adopted and in many foreign countries, the court may order the seller specifically to perform the contract, that is, actually turn over the goods in question without giving him the option to retain them and pay damages. In some countries, the buyer may go into the open market and buy for account of the seller to replace goods not delivered. Even if he pays a higher price than the market price, as long as he acts in good faith, the seller has to stand for it. Sometimes, he has to apply to the court for permission to make such purchases.

Finally, the seller who has not been paid for his goods has two rights: the "vendor's lien" and "stoppage in transit."

Vendor's Lien and Stoppage in Transit

The seller can retain possession of the goods until he has been paid, barring agreement to the contrary. When he takes a bill of exchange or other negotiable instrument for the price, the instrument operates as a conditional payment. On the dishonor of the instrument, his rights revive. This right, called the vendor's lien, is of world-wide application; as is also the right, most important in overseas business, of stoppage in transit or something closely analogous to it. Even though title has passed, if the buyer becomes insolvent while the goods are still in transit—that is, while they are still in the hands of a carrier or forwarding agent before they have come into the possession of the buyer—the seller may resume possession of them. This right is made effective by giving notice to the carrier or other person in whose hands they are. The right of stoppage cannot, however, be exercised to the prejudice of third parties to whom the bill of lading or other document of title to the goods has been lawfully transferred for value.

It will be recalled that in some countries the invoice serves as a document of title—

so that, if the goods have been sold on the faith of the invoice, the right of stoppage cannot be exercised. This is the law in France and countries that have followed the French code.

In case of the buyer's bankruptcy, some countries give the seller, especially if the goods were obtained by fraud, a right to reclaim the goods, thus in effect giving him a preference over the other creditors.

Conditional Sales

By a conditional sale, the seller retains title to the property in order to secure payment of the purchase price or installments. Many so-called "leases" are really conditional sales. Such sales are comparatively rare in direct overseas trade, but there is no reason why the practise should not be greatly extended to the benefit of American commerce, especially where the exporter has agencies or branches abroad. In order that full security may be had, familiarity with the laws of the country where the buyer lives is necessary.

In this country we are familiar with the requirements, in most states, that such contracts must be recorded. This must be done in order that they may be effective against third persons. Similar formalities have to be complied with in many foreign countries. In a few, provided the contract is in writing, no

publicity is necessary, and not only is the buyer who wrongfully sells the property liable to criminal prosecution, but the condition holds good against creditors—though rarely against purchasers in good faith. In other countries, contracts corresponding to our conditional sales of personal property are prohibited (e.g., Argentine C. C., 1374); and the term "conditional sale," if used commercially, means something very different from our conception. The courts have annulled an attempt to get around the prohibition by making the contract take the form of a lease. This, however, seems permissible under the French Code.

VIII

Carriers and Navigation Laws

FROM the earliest times, common carriers have been held to a very strict liability for the safe custody and delivery of the goods intrusted to them. To prevent any temptation to fraud, they were never allowed to plead hard luck stories; but were practically insurers of the goods during transportation. If they did not deliver the shipment safe and sound at the agreed destination, they were liable for its value. This rule of liability applies equally to carriers on sea and carriers on land. It seems to be as nearly universal a rule of law as can be found.

When the Carrier Is Not Liable

The exceptions to this liability are those cases in which the carrier can prove beyond a reasonable doubt that the loss was caused "by the act of God or the public enemy," by an inherent defect in the goods themselves, or in the case of animals, by their inherent propensities. The equivalent of these exceptions, though somewhat differently phrased, is also to be found in the law of practically all countries. The civil law speaks, generally, of

vis major (*force majeure*), and unavoidable accident, instead of "act of God," but, so far as the layman is concerned, the difference is rather subtle and technical. The courts in civil law countries are inclined to be a little more liberal in their interpretation of the phrase; in some of the Latin-American countries, especially, *fuerza mayor* often covers a multitude of sins.

An act of God is any accident, due to natural causes without human intervention, which no reasonable foresight or care could have prevented. Earthquakes, lightning, extraordinary floods and (particularly at sea) storms, tornadoes, waterspouts, striking an uncharted rock, are examples. The words "perils of the sea" are not exactly equivalent.

Duties of Carrier

The common carrier in our law has always been bound to carry for all who offered, without discrimination and for a reasonable rate. This, as an underlying principle, is not the case in civil law countries. In them, carriers in general can contract freely with whom they please and on what terms they please. With the development of modern conditions, our rule that, barring limitations of space and reasonable requirements, the carrier must receive everybody's goods, has been applied to railroads and other special cases; and so far

as rates are concerned, railroads and many other public service companies are today almost everywhere subject to government regulation or supervision. Government-owned transportation utilities are frequent; they are usually subject to the same liability rules that affect privately-owned concerns.

The carrier is universally given a lien on the goods for the payment of freight charges. He is under no obligation to deliver if he is not paid in full. In some countries, this lien persists even for a few days after delivery, as long as the goods have not passed into the hands of third parties.

Contract Exemptions from Liability

The differences of most practical importance in the law are those resulting from the treatment accorded by the courts or by statute to the exemptions from the general rule of liability which carriers commonly attempt to obtain by special provisions in the bill of lading or other document.

In the solution of such questions, the law is confronted by a conflict between the general principle that entire liberty of contract should always be permitted and the practical fact that carriers, if left to themselves, usually have the whip-hand over shippers, who willy-nilly have to accept bills of lading or receipts which contain all manner of limita-

tions on or exceptions to their common law liability.

Different jurisdictions treat these differently. It is generally held that carriers cannot exempt themselves from liability either for their own negligence, or that of their servants or agents. On the other hand, limitations as to the amount of liability, if an extra freight charge according to higher valuation is not paid, are usually allowed. Stipulations shifting the burden of proof from the carriers to the shipper in case of claims for damage to fragile articles or live stock are commonly upheld in the Latin-American countries, as well as in a few of our own states. Stipulations providing that claims shall be barred unless notice is given to the carriers within a limited time after delivery, are also valid; indeed, many of the codes prescribe that such notice must be given within 24 hours. This point Americans abroad should bear in mind, and also the frequent provisions in the codes that damages must be ascertained immediately by experts appointed by the parties, or if they cannot agree, by the court, or if neither of these courses is followed, the goods must be deposited.

The principles we have laid down apply equally to land and water carriers. The

overseas trader is generally more interested in the subject of marine transportation than in that of land carriage. But limitations of space forbid our entering into the general field of maritime law. Fortunately, even more than in other branches of commercial law,[1] substantial uniformity exists here. This is due to the fact that shipping (except in the coastwise trade) is essentially cosmopolitan, navigation being freely open to foreign ships. The modifications that have been introduced have been generally with an eye to the better protection of passengers and crew, and rarely affect the purely commercial aspects. The formalities required for charter-parties and bills of lading may differ from place to place, just as the language in which they are couched may differ; but so far as the essential fundamental characteristics of these documents and of the contracts which they evidence are concerned, the law the world over is remarkably uniform.

Maritime Law

Notice should be taken, however, of a few of the more important federal statutes of the United States in force which declare or amend the general maritime law.

[1] In the foreign codes, maritime law is usually treated as one of the subdivisions or books of the commercial code. Many countries, however, have a separate code of maritime commerce.

United States Navigation Laws

The *Harter Act,* passed in 1893, provides that if the owner shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, no responsibility for damage or loss resulting from errors in navigation or in the management of the vessel shall attach to the vessel, her owner or owners, agents or charterers. But exemptions from liability for negligence and from the duty of the owner to properly equip and outfit and make the vessel seaworthy, and to carefully stow, handle and deliver the cargo are prohibited. The Act also summarizes the general exceptions to liability as follows:

> Nor shall the vessel or her owners be held liable for losses arising from damages of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality or vice of the thing carried or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Another section prescribes the duty of issuing bills of lading and their requirements.

Another statute declares the rule previously recognized by most courts that the carrier's full liability does not arise for precious metals or other valuables of small bulk, if

the shipper does not give written notice of their true character and value and have the same entered on the bill of lading. Neither is the owner or charterer liable for loss or damage caused by fire aboard, unless he be at fault; and his total liability as a carrier is limited to the value of his interest in the vessel and her freight. This limitation was invoked, it will be recalled, in the case of the *Titanic*.

Coastwise Trade

The coastwise trade is restricted to United States vessels, that is, vessels registered pursuant to law in the United States and wholly owned by citizens or corporations of the United States and commanded and officered by citizens.

On United States vessels registered for foreign trade, all watch-officers must be citizens, though the President is authorized to suspend this requirement. (At the time of writing, an executive order suspending the requirement is in effect.) At least 25 per cent. of the crew must be able to understand any order given by the officers. (This is one of the provisions of the recent Seamen's Act that has given rise to so much discussion.) The captain is required by law to enter into a written agreement with every seaman in the crew. It is unlawful to pay any seaman wages in advance; and wages cannot be at-

tached or assigned, though they may be allotted to relatives. Clothing is also exempt from attachment. Under the recent Seamen's Act, the right, under treaties, to arrest deserting officers and seamen, in foreign ports and in the United States, will be discontinued. The scale of provisions to be served out to the crew is regulated; sailors are required to be divided into at least two, and firemen into at least three watches. Vessels are required to carry an official log-book. The Navigation Laws of the United States, as compiled from time to time by the Bureau of Navigation of the Department of Commerce (the latest edition is that of 1915), also cover a wide range of other regulations relative to shipping and the carriage of goods and passengers at sea.

IX

Forms of Payment

TO extinguish an obligation, payment must be made at a proper time and place and in a proper medium; our law adds, "by and to a proper person." Most countries permit parties to a contract freely to stipulate the medium of payment. Thus, bonds are usually made payable in gold coin of a stipulated weight and fineness. Traders, especially with the Latin-American countries, are well accustomed to differentiating gold from silver and these from paper currency in their daily dealings. Some countries issuing depreciated inconvertible paper currency prohibit, and render invalid, especially in times of war, any clause in a contract intended to prevent payment in the depreciated legal currency of the country. They may make it compulsory legal tender and not merely optional. Agents abroad must, of course, always keep themselves posted as to the monetary laws in the countries they serve; the manufacturer and exporter also should keep on the alert.

Settlements in money and paper currency form but a small part of business. Modern

business rests on credit, not cash. Substitutes for money, not money itself are most used in payment. For home use the check, for foreign use the bill of exchange, reign supreme. It is in facilitating the use of substitutes for money, that banks and bankers find one of their chief functions in modern society.

Modern Business Rests on Credit

The relations of our banking system to the development of foreign trade are dealt with in another unit of this series, but the present book would be incomplete without a passing reference to the great changes in our banking laws effected by the Federal Reserve Act of 1913. Under this act, national banks having capital and surplus of a million dollars or more are permitted to open foreign branches, and all banks in the federal reserve system are authorized to accept drafts or bills of exchange growing out of transactions involving the importation or exportation of goods and drawn upon them, and to rediscount, with the federal reserve banks, acceptances based on the importation or exportation of goods. Both of these beneficent new features of the law have been availed of to the advantage of our foreign trade. Doubtless, in the course of time, agencies abroad will be established by the reserve banks as now permitted by the law, and amendments

will also be passed providing for the cooperation of member banks in owning and operating foreign banks.

Checks

With the legal aspect of checks, we need not concern ourselves. They are usually home-keeping tools. Companies sometimes take the precaution to have their agents abroad open bank accounts in the name of the company, subject to some control by the home office and not in the agent's own name. Other occasions for knowledge of the foreign law of checks are few. It may be well, however, to call attention to the fact that the English system of crossing checks has been adopted in some countries that are not Anglo-Saxon. When a check is crossed, it can be collected only by a banker. Also, in a great many countries, a bank is not liable if it pays out on a forged endorsement, except negligence be affirmatively proved against it.

Bills of Exchange

Bills of exchange, however, are of vital importance to our discussion. Originally, they were a substitute for transporting money from place to place. Today, the use of the draft as an instrument of credit has thrown its employment purely as a medium of foreign exchange quite in the shade. But the law in many countries has lagged behind business. The laws of the world governing bills of exchange may be

grouped according as they give or do not give recognition to the draft as an instrument of credit.

In many countries, it still is the law (often contrary to actual business facts), that a bill of exchange presupposes a prior contract of exchange. That is to say, the Code Napoleon and the others that follow it base their law on the assumption that a bill of exchange is drawn because some such transaction as this takes place: A in Paris wants to pay B in London; so he goes to C in Paris, who has money on deposit with D in London, and buys and pays for C's draft on D at terms which they agree upon. Here we have a definite contract of exchange. There are to-day a score of different kinds of credit transactions, which occasion the drawing of drafts. Antiquated laws still attempt to apply to them the rules devised for the typical exchange transaction we have given. Merchants often ignore these laws. Something goes wrong. An innocent party suffers.

Old Theory Imposes Many Limitations

As a consequence, where the old theory is adhered to (including France and half the Latin-American countries), many restrictions and limitations are imposed, which are unknown to us. The law attempts to safeguard the contract of exchange in various ways.

For instance, accommodation paper is frowned upon. The drawer cannot draw on himself or draw on the same place, nor can the draft be drawn to bearer or indorsed in blank or restrictively. A precise statement of the nature of the consideration is required. Any false statement, whether of name, value given, description, place where drawn or place of payment or omission to specify the place and full date when drawn or the other formalities, renders the document non-negotiable and invalid as a bill of exchange. It will readily be seen that there are many pitfalls for the unwary or the careless. Knowledge of home customs merely is insufficient.

Under this old theory, a bill of exchange is often, in contradistinction to our law, treated as of itself an assignment of the funds in the hands of the drawee available to the payment thereof; and the drawee, or even his estate in bankruptcy, is liable. The obligation to furnish cover—that is to say, to make provision of funds—and its scope and limit play a very important part in foreign legal treatises on the subject of bills of exchange. Such discussions, under our system of law, are academic. Unless the drawee has authorized the drawing of the draft, there is never any duty on him to accept it.

In addition to the technicalities we have mentioned, it is of course true that failure to include all of the really essential characteristics of a bill of exchange, as we know them, may either invalidate the instrument altogether or deprive it of the advantages it would otherwise possess. Our own Uniform Negotiable Instruments Law, which has been adopted in practically every state and is substantially in accord with the English Bills of Exchange Act, requires a bill of exchange to be an unconditional order in writing to pay on demand or at a fixed or determinable future time, a certain sum in money to order or to bearer. If it does not comply with these few requirements, it is not negotiable. If it does, it is negotiable.

Negotiability

Just what do we mean by the word "negotiable"? Business men may never have stopped to think about it, but instruments that are classed as negotiable possess some really remarkable peculiarities. They are transferable by delivery, or by endorsement and delivery. The holder can sue on them in his own name and, more beneficial and extraordinary yet, the bona fide holder may acquire a better standing than his transferor may have had. His ownership is free from most defects of title of the transferor or of any prior holder,

and consequently he cannot be met with defenses that would be available against the transferor. It is one of the rare cases in the law in which a man can give a better title than he holds. If a non-negotiable instrument is assigned, notice must be given to the debtor. No special notice of the transfer of the negotiable instrument need be given. If the debtor pays his original creditor, the original owner of the instrument, without insisting on the paper being presented and surrendered, he does so at his peril. He may have to pay over again to someone else—the holder.

These essential characteristics seem to apply the world over to bills of exchange legally recognized as such. In some countries even greater protection is given to innocent holders than with us. They are protected even against forgeries in the chain of endorsements. It is in deciding what shall and shall not be treated as a bill of exchange that laws differ. The technical requirements of the French code have been abolished in whole or in part in most modern codes, but they still unfortunately abide in far too many countries.

The underlying principles as to endorsement and acceptance and the liabilities and obligations arising therefrom, as to present-

ment for acceptance and for payment, and the necessity, in case of dishonor, of protest and notice to prior parties in order to hold them liable—these are much the same the world over. But details and formalities differ widely. A few instances of diversity may be given:

United States	Other Countries
1. Endorsement after maturity transfers draft, so that holder can sue in his own name.	1. Endorsement after maturity is not recognized. There must be an assignment under formalities for non-negotiable instruments. (Argentina.)
2. Drawee can keep bill for 24 hours within which to accept.	2. Drawee must accept or refuse the same day.
3. Unconditional promise to accept may be equivalent to acceptance.	3. Promise to accept a bill is not equivalent to acceptance. (France, Chile.)
4. Holder may at his option take a qualified acceptance (e.g., to pay only a partial amount).	4. Holder cannot take qualified acceptances.
5. Usual but not indispensable that protest be made by notary.	5. No protest, except by notary, is valid. (Spain.)
6. Protest by notary does not require witnesses.	6. Notary's protest must be attested by two witnesses. (Portugal.)
7. Protest must be made on day of dishonor, but noting suffices and formal protest may be subsequently drawn up.	7. Formal protest must be drawn up before sunset of day following dishonor. (Spain.)

Lengthening the List of Negotiable Instruments

The tendency of the law is to make other instruments, in addition to bills of exchange and promissory notes, negotiable, or to give them some of the characteristics of negotiability. Government and corporation bonds, checks, certificates of deposit, letters of credit, certificates of stock, bills of lading, warehouse receipts, are today in most jurisdictions negotiable, though the law frequently lags behind mercantile usage. In general, the code countries are ahead of us in giving negotiability to a wider range of instruments.

Fortunately for merchants and bankers, very few drafts go wrong; otherwise, it is to be feared, great difficulty would often be experienced in holding foreign parties liable if they were to stand on their strict legal obligation. In practise, merchants, for the sake of their credit, often recognize liability on dishonored paper from which they might escape on technicalities. But it is never safe in business to rely on such practise and to ignore or neglect the technicalities.

An international conference held at the Hague in 1912 drew up uniform regulations on bills of exchange, covering a great many of the principal phases of the law. It is likely that its recommendations will eventu-

ally be enacted into law in a great many countries, thus doing away with the wholly needless, often irritating and occasionally costly diversities that at present exist.

Interest

In code countries, obligation to pay interest is always presumed on accrued indebtedness in the case of a trader, but not in the case of non-traders. It is always advisable, therefore, in export transactions, to have a distinct stipulation for interest. This should also cover the rate of interest. In some countries, the legal rate—that is, the rate that is to be paid in the absence of an express agreement—is less than our standard 6 per cent. In Germany, it is 5 per cent.; in France, in normal times, the legal rate is only 4 per cent. in civil, 5 per cent. in commercial matters. Compound interest is usually, though not invariably permissible, but there must be a very clear and definite understanding to warrant its collection.

In agreeing upon interest, care must be taken not to infringe the usury laws. It is not even safe to assume that a stipulation for as low a rate as 6 per cent. will everywhere be held lawful. In France, 5 per cent. is the highest rate of interest allowed in civil matters. More progressive than we are, the French in commercial matters permit full liberty of contract as to interest. In general,

there are few countries that are as strict and as backward on that point as our own. The effect of the usury laws is not merely to prevent a higher rate of interest than the lawful rate from being collected, but often an agreement for too high a rate will forfeit not merely the interest but also the principal.

X

Security for Payment

WHEN a sight draft is drawn, with bills of lading attached, so that the buyer does not get the goods except on payment, very little risk is taken. Credit is extended only during the course of transit. The transaction is not really one in which security is taken. It is, as we saw in the chapter on Sales, a case of the vendor's lien.

The same is true when documents are to be delivered only against payment of a time draft. But even in this elementary transaction, a certain caution must be exercised. In a few Latin-American countries (Colombia, Santo Domingo, Panama, Venezuela), the custom house authorities do not recognize "to order" shipments and will deliver the goods to the person named as consignee in the consular invoice. American exporters to these countries have frequently been disappointed to find that the purchaser has obtained the goods without simultaneously paying for them.

When a time draft is drawn against a shipment, it is usually intended that the bill of lading, and through it the possession of the

goods, shall be turned over to the buyer upon acceptance of the draft. Here, then, we have a case of credit being given for the time the draft is to run. In commercial language, the shipper has received security—the buyer's acceptance on the draft. In the broad sense, anything that renders payment or other performance of a contract more sure is security, but it will be recognized at once that the security afforded by the mere acceptance is very different in kind from that which the creditor has when he retains possession of the goods or is given something valuable in itself against which he can enforce the claim, additional to the general liability of the debtor.

Advantages of Notes and Acceptances

The first kind of security is general—drafts and promissory notes are the most common forms. They have two obvious advantages over an open account:

1. The obligation takes a form under which the debtor cannot easily dispute his liability; it is more easily proved in court, and the process of obtaining judgment and execution thereon is more expeditious.

2. Being negotiable, they can readily be discounted with bankers and the creditor can be put in funds immediately without waiting for the expiration of the credit.

In addition, in many foreign countries, on the distribution of the assets of an insolvent, the holders of negotiable paper are given a preference over ordinary creditors. In such countries, we frequently find that commercial suits are divided into two classes: *Ordinary suits,* which may be long and tedious and subject to long-drawn-out appeals; and *execution suits,* which are summary, the possible defenses few, and appeals therein do not act as a stay.

Suits on bills of exchange are nearly always execution suits. So, generally, are suits on promissory notes, but sometimes, in order to gain this advantage, the promissory note may require some special formality, such as execution or acknowledgment before a notary public, and there is often a very short statute of limitations, requiring that suit must be brought within a very short time after failure to pay. Revenue requirements as to stamps, etc., must always be carefully complied with. When the date of payment is not specified, in some countries, the note is payable within ten days after execution: with us, it is payable immediately after demand.

We come now to the other kind of security. Here credit is allowed on the strength of something additional to the debtor's gen-

eral credit and written promise. The principal forms in common use are: pledge, mortgage, and guaranty or suretyship.

Collateral Security

The chief distinction between pledge and mortgage is this: in the former, possession of the property is given to the creditor; in the latter, the debtor or owner remains in possession. In our law there are a number of other highly technical distinctions (as, for instance, that in a pledge there is a transfer of possession only, while in a mortgage there is a transfer of title), which are not generally recognized in foreign law and with which we need not concern ourselves.

In many foreign countries, the laws have not kept pace with the growth of pledges in commercial usage. Transactions are financed on an enormous scale by the hypothecation of corporate securities and of instruments (principally bills of lading and warehouse receipts) representing merchandise and commodities, yet the theory of the law embodied, often without amendment, in codes modelled on the French *Code de Commerce,* is that only traders in needy circumstances and on the verge of insolvency will resort to a pledge. Mercantile transactions have to fit the mould made for dealings with a pawnbroker.

Needless to say, a pledge by delivering actual possession of the goods themselves, is very rare in business: pledges are generally made by delivering the negotiable instruments representing the goods. But actual or constructive delivery of possession is universally indispensable to the full validity of a pledge. While the transaction might be upheld as between the pledgor and pledgee, nevertheless continued possession by the latter is indispensable to make it good as against third parties. The law has constantly in mind that the debtor must not be allowed to procure credit fraudulently by being supposed to own goods that in reality someone else has a claim to. So careful is the law in regard to this point in some countries, that chattel mortgages cannot under any circumstances be made.

Delivery of Possession to Pledgee

In most of our states, security can be given to a creditor by means of a chattel mortgage (whereby the debtor retains possession) that will be upheld against creditors provided—and this is usually held indispensable—publicity be given to the transaction by filing and recording in a public office. But in few foreign countries is even this allowed: the rule is phrased that there can be no mortgage of personal or movable property;

mortgages can only be made of real estate.[1]

If the pledgee, whether wrongfully or with authority, in turn pledges or sells the security in regular course to an innocent party, the latter nowadays is usually protected. Similarly, modern law protects persons who in good faith lend money to factors or other agents in proper possession of property, against claims by the real owner. This is the general rule everywhere.

In some respects, however, our law of pledge notably differs from the civil law. With us, goods pledged, in the absence of special agreement, cannot be held for any other debt than that which they were given to secure. In the civil law, the creditor can in general hold them, if the other debts are certain and liquidated, due and payable and contracted after the obligation for which the pledge was given. Abroad the debtor is often given the right to substitute other security of equal value and can apply to the court to enforce this right; with us, in the absence of a special agreement, he has no such right. The creditor, too, is given a reciprocal right: if the security becomes im-

[1] There are some special exceptions, e.g., mortgages of ships. The same principle will render sales on memorandum or consignment invalid as against creditors or third parties generally.

paired he can call upon the debtor for additional security, and if this is not forthcoming the debt becomes immediately payable; with us, the creditor has no such right, except by express agreement. Abroad the sale of a pledge on default usually requires a court order and must be at public auction.

Mortgages of Realty

Mortgages of real estate are often taken by exporters as security for special advances or open accounts current, or for past due accounts. Their validity always turns upon the highly technical rules governing real estate (though in few places so technical as the English and American law generally is), and the services of a local lawyer will always be advisable, if only for the examination of the title. This is often far simpler than with us.

Most civil law countries possess a system of compulsory land registration analogous to what we know as the Torrens system. With us, registration under the Torrens Acts is optional, not compulsory, and has not come into general use.

The land credit or mortgage bank in many foreign countries is a highly developed institution. The mortgage certificates sold by the banks are widely held by investors, and can be safely taken as collateral. Similarly,

transactions between individuals and bond or debenture issues by companies are greatly facilitated. A mortgage certificate is issued by the land title registrar for a parcel of land, which is readily assignable and usable for commercial purposes. It represents a lien on the land, much as a bill of lading or warehouse receipt represents goods or commodities. It may even be made out to the owner of the land or simply to bearer. Coupons for interest payable to bearer may be attached. Land is thereby in economic parlance "mobilized," and becomes an effective tool of commerce for purposes of credit—for the security may carry with it not only an official authentication of the title, but also an official appraisal. Holders in good faith are protected. It is in Switzerland (there the mortgage certificate, as in Germany, is known as *schuldbrief*) that the greatest progress seems to have been made in this respect.

Mortgage Certificates

In some of the Latin-American countries, mortgage foreclosures are often tedious. In such countries, a more effective form of security than a mortgage can be obtained by an outright deed with a clause known as the *pacto de retroventa.* Such a deed transfers the title absolutely, with an obligation to resell and retransfer upon repayment of the

sum mentioned as the purchase price. The German *wiederkauf* seems similar.

Commercial Guaranties

Commercial guaranties rarely require any particular formality except that they must be in writing. The courts everywhere seem inclined to interpret them liberally, even more so in foreign countries than with us.

Our law distinguishes between guaranty and suretyship: A surety is considered as a principal debtor who is primarily obligated to see that the debt is paid and can be sued directly on the obligation; a guarantor is only secondarily bound to pay the debt if the principal debtor does not. Most of the legal principles are common to both. The civil law groups the two together, but draws an artificial distinction between civil and commercial guarantors. A commercial guarantor is always presumed to be what we would call a surety—that is, he is primarily bound and can be sued directly; while a civil guarantor can be sued only after judgment has been obtained against the principal, and has not been satisfied. In either case, express agreements can vary the general rule.

The important thing, both at home and abroad, is to see to it that the guaranty is properly drawn so as to cover the real intention of the person seeking or giving se-

curity. In drawing up a guaranty many details must be borne in mind—just what sales or debts are to be included; whether it is to cover past as well as future transactions; whether the guarantor is to receive notice of the acceptance of the guaranty and advances on the strength of it; whether, how and when the right of revocation may be exercised; whether it is to be affected by changes in the firms of any of the parties; the pecuniary and time limits of the guaranty; whether notice of default must be given to the guarantor; whether he is to continue liable even after an extension of time has been voluntarily given by the creditor; whether judgment must first be obtained against the principal debtor before holding the guarantor liable, or whether the latter becomes liable immediately upon default or notice. All of these points must be considered and provided for.

XI

Collections and Bankruptcy

ABROAD, even more than at home, the credit man must be on his job. Claims must not be allowed to grow stale. Diligence is vital. When an account is overdue, or at the first hint that payment may not be made at maturity, prompt action must be taken.

Credit Representatives

The nature of such action must rest on sound business judgment. The proper selection of the kind of pressure to be exercised—ranging from mere correspondence or withholding of credit to the use of judicial process—calls for the exercise of rare business talent and knowledge of human nature. Personal intercourse with the debtor is always advisable. As this is difficult and often impossible when he is in a foreign land, trustworthy agents must be selected.

The best advice that can be given is this: Select the representatives at the time of the sale and when credit is extended. Do not await the time of trouble to safeguard against the emergency. It is feasible for a trader without a permanent general representative

or agency in the foreign country to have some merchant, banker or lawyer act as special credit representative. Such a representative can keep the home office posted as to the credit condition of foreign customers, and is in a position to take prompt action upon receiving cable or mail advices of default. Such preparedness involves a minimum of expense and is good credit insurance.

Powers of Attorney Necessary

Agents of the character indicated would often be in a position at a critical or psychological moment to obtain security or to invoke the law. They should be furnished with a power of attorney ample enough to enable them to take appropriate action. In contradistinction to our American practise, lawyers abroad usually need a formal power of attorney before they can start suit or otherwise appear in court. In the United States generally, the due authority of an attorney-at-law to represent his client is presumed; abroad, he has to file his power.

When it is decided that suit is necessary, delay can be avoided by arming the lawyer at once not only with the power of attorney, but with all the evidence and the complete history of the case. Letters and documents and phases of the case that may seem unim-

portant to the business man may be found by the lawyer to have an important bearing.

Foreign Procedure

To prosecute claims in court, the employment of a lawyer will always be found necessary. If a reliable attorney be employed, the exporter need not concern himself at all with foreign practise and procedure. Into the myriad diversities of domestic and foreign law in practise and procedure, we do not need to enter. Information on these may occasionally be of use in deciding whether or not the attorney is prosecuting a claim diligently; and the credit man, in extending foreign credits, should always have in mind the general situation in regard to the ease and expeditiousness of enforcing claims. It is also true that countries which effectively enforce criminal liability for obtaining credit on false representations made direct or to commercial agencies are usually safe to trade with.

We pointed out in a preceding chapter the advantages of having the debt evidenced by bills of exchange or promissory notes. When this is not feasible, attempt should always be made to put the claim at the time of, or immediately after, its creation, in such condition that it cannot be easily disputed. This can be done by rendering an account which will, if uncontradicted, serve as an account

stated; and acknowledgment of receipt of it in writing should be insisted on. The employees who mail the account should be in a position to testify positively to the fact that it was sent and should not rely on the course of office routine.

It is obviously not only cheaper but more advantageous to sue at home than abroad.

Suits at Home

Occasionally your foreign debtor may be doing business with other concerns in this country and have goods on hand, or a credit balance with them, or deposits in bank, or some other property here. In those cases, his property can be seized, an attachment levied and the suit prosecuted after service of the summons by publication. Sometimes the delinquent foreign debtor himself may be caught while on a visit to this country, the summons served personally on him and payment thus forced.

In general, judgments obtained upon service by publication will not be recognized and enforced abroad, and a great many countries also refuse to give recognition to judgments obtained against their own citizens and residents, if the personal service is made while they are merely temporarily on a visit, unless there are other grounds on which they will concede that our court had jurisdiction.

But the occasions when the man or his property can be caught here are rare prizes in the lottery. As a rule, when suit is necessary, it will have to be brought in the country of the debtor's residence.

Not all countries suffer quite as much as we do from the law's delays. Especially in commercial cases founded on written evidences of indebtedness, prompter action can usually be obtained in the European countries than in the United States, but even so, if an unscrupulous debtor or his lawyer wants delay, he can generally succeed in obtaining it. Provisional remedies, such as attachment and restraining orders, generally are more readily obtainable abroad than with us.

Suits Abroad

The cost of foreign collections will generally be higher than at home. There is extra expense caused by consular authentication of powers of attorney, court costs are frequently higher, security for costs nearly always is required from non-residents, and testimony often must be taken by deposition. In addition, few reliable foreign lawyers will undertake the collection of claims on a contingent basis, which is the usual practise with commercial collection attorneys in this country.

Concerted action by creditors often be-

comes unavoidable, disastrous as bankruptcy proceedings usually are. Bankruptcy proceedings have two general purposes: (1) to secure an equitable distribution of a debtor's assets among all his creditors, and (2) to give the honest man, who has become financially involved, a fresh start in life by releasing him from his debts.

Bankruptcy

Some striking differences between common law countries and the others appear in their bankruptcy laws:

1. There is the difference which naturally follows from the drawing of a sharp line between traders and non-traders in the code countries. In most of the code countries, bankruptcy proceedings are confined to traders (though in Germany and Austria they apply to all debtors). This is true whether the proceedings are voluntary or involuntary—that is, whether brought by the debtor himself or by his creditors. It is considered a more serious offense for a merchant to fail to pay his debts than for an ordinary citizen to fail to pay. In order to arrive at a distribution of the assets, proceedings slightly analogous to bankruptcy commonly exist for non-traders; these are known as *cession* of property by the debtor to his creditor, or, if instituted by the creditors, as *concourse;* but discharges are not

Traders and Non-traders in Bankruptcy

granted and there are other important differences.

What Justifies Bankruptcy Proceedings

2. Abroad, mere suspension of payments and inability to meet current obligations is sufficient ground to start proceedings. With us, for creditors to take action, they must allege (and of course be prepared to prove) insolvency and the commission, within four months of an act of bankruptcy. Acts of bankruptcy are fraudulent transfer or concealment of assets; preference to one or more creditors over others, either given voluntarily or through legal proceedings; making a general assignment; the appointment of a receiver; admission in writing of inability to pay debts and willingness to be adjudged a bankrupt.

Four Kinds of Bankruptcy

3. Bankruptcy abroad is classified into a number of grades or kinds, and different rules are applicable to the various kinds. The classifications differ, but the following are usually found: (1) mere temporary suspension of payment, (2) failure (*faillite*), (3) simple bankruptcy or culpable insolvency, (4) fraudulent bankruptcy.

The state of "suspension of payments" in some countries permits a debtor, who is merely temporarily embarrassed, to call his

creditors together *under the auspices of the court,* to obtain an extension of time or a voluntary composition with creditors. French *liquidation judiciaire* is similar.

"Failure" (French, *faillite;* Spanish, *insolvencia fortuita*) is the state of affairs in which insolvency has been caused by unfortunate circumstances and legitimate business hazards.

"Simple bankruptcy" (or culpable insolvency) and "fraudulent bankruptcy" are criminal in code countries. The law is much stricter than in the United States. These two classes include not merely concealment of assets and fraudulent preferences, but any bankruptcy due to gross negligence or fault or highly improper conduct—such as extravagant living, gambling or speculation impairing assets; selling off at a loss or below market rate goods bought on credit, bills for which are still owing; keeping false books of accounts or no books; breach of fiduciary obligations; drawing unauthorized drafts; absconding.

Discharge of the Bankrupt

4. A speedy discharge and rehabilitation of the bankrupt so that he can thereafter trade for his own account is granted only to bankrupts of the innocent grades in code countries. Culpable bankrupts can obtain rehabilitation only after having served their term of imprisonment

and paid their debts in full. Fraudulent bankrupts, in addition, usually have to wait a long period, 10 years or so. In some countries discharge from debts cannot be obtained even by innocent bankrupts.

With us, a discharge is always readily obtainable, and in general is not withheld except for some wrongful act in the course of the bankruptcy proceedings, such as perjury or withholding assets from the trustee.

There are, of course, a great many technical differences as to the legal effects of bankruptcy. These are of more interest to the lawyer than to the merchant. The ordinary course of winding up a bankrupt estate [publication of notices, filing of claims, meetings of creditors, election of a trustee (French, *syndic;* Spanish, *sindico*), composition with creditors, sale of assets and distribution of dividends among priority and ordinary creditors], while differing enormously in detail, is fairly standard the world over. In general, foreign creditors, if they duly file and prove their claims, are allowed to share equally with resident creditors.

XII

Tariffs and Customs Laws

THE provisions of foreign tariffs may be divided into two parts: (1) the tariff schedule proper, and (2) the general regulations affecting the entry of shipments, as prescribed by the customs regulations, consular laws, and various sanitary regulations.

Tariff Schedules

Foreign tariffs are, as a general rule, divided into "schedules." These are classifications or groupings made in accordance with the component material or degree of manufacture of the articles included in the tariff. A miscellaneous schedule is usually provided for articles that cannot be classified under any other schedule. In some of the more industrially developed countries, like Germany for example, the tariff is highly "specialized"—that is, the rates are adjusted in accordance with the needs of the domestic industries and the treaty relations of the country. In some of the less developed countries and most of the colonies, the tariffs are much simpler in structure and are adjusted primarily with a view to the fiscal needs of the country.

With the exception of Cuba, the Netherlands and the Dutch East Indies, the Philippines and most of the British possessions (notably Canada, Australia, New Zealand, Union of South Africa, British India, and the West Indies), the rates of duty prescribed by the customs tariffs of foreign countries are almost entirely "specific." That is to say, they are levied on the basis of weight, measure or number, and are not affected by the value of the goods. In the countries specified above, "ad valorem" rates (rates expressed in percentages of the value of the goods) are prescribed under various schedules for many articles. In Japan and some of the Latin-American countries similar rates are imposed on articles not specified.

In the case of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, most of the rates are nominally "ad valorem," but actually "specific." In those countries there are in force so-called "valuation" schedules, which provide fixed valuations for most articles. The rates of duty are expressed in percentages of these official valuations, instead of being levied on the basis of actual market values, as is the case with real ad valorem rates. Thus, in Argentina the ad valorem rate prescribed for neckties is 40

per cent., but the fixed valuation on which the rate is levied is 2 pesos per kilo for cotton neckties and 16 pesos per kilo for those made of silk.

Basis of Rates

The basis for ad valorem rates of duty in most foreign countries is the value of the goods at the port of importation, which is usually ascertained from the invoice, supported by such additional proof as may be required by the customs authorities, and verified by means of data at the disposal of the customs. In Canada the basis for ad valorem duty is the same as in the United States—namely, the fair market value of the goods in the country of exportation, packed ready for shipment. In some countries where the dutiable value is the value of the goods at the port of importation, a certain percentage is added to the invoice value to cover freight, insurance and other expenses incidental to shipping the goods to port of destination. Special anti-dumping laws are in force in Canada, Australia and the Union of South Africa.

In the case of rates of duty based on weight, the basis may be gross, legal or net weight. In most European countries, only articles subject to a low rate of duty are dutiable on gross weight—namely, the weight of merchandise plus packing; most

articles are dutiable on actual net weight—namely, on the weight of the article ascertained by actual weighing, or on "legal" net weight as determined by deducting from the gross weight certain "tare" allowances, varying with the character of the container and packing. In Switzerland all articles are dutiable on gross weight and there are special surtaxes prescribed for goods imported without the ordinary containers or packing. Gross weight is also the basis for duty in a number of Latin-American countries, notably in Colombia, Costa Rica, Honduras and Venezuela. Many articles are dutiable in some Latin-American countries on "legal" weight, which usually includes the weight of the articles themselves and that of the immediate containers.

Character of Tariffs

Most of the European countries and the more important British colonies have tariffs with more than one set of rates. The higher rates, designated as the "general" tariff, are applied to imports from countries not entitled to any tariff concessions. The lower rates—known as the "conventional," "minimum," "intermediate" and "preferential," according to their origin or application—are extended to imports from countries entitled to tariff concessions, either by treaty or by a special law.

The "conventional" tariff represents all the tariff concessions provided for by all the commercial treaties concluded by the particular country. The "minimum," "intermediate" and "preferential" are fixed by law, the first two being applied to foreign countries entitled to tariff concessions, while the third is reserved by a colony for import from the mother country or other colonies of such a country, or by an independent country for imports from a country entitled to preferential treatment. Examples of preferential tariffs are to be found in the British dominions, notably Canada, Australia, New Zealand, and the Union of South Africa, where British goods enter at a lower rate than foreign goods. Cuba and Brazil furnish examples of preferential tariffs extended by an independent country. The former grants preferential reductions on practically all imports from the United States, by virtue of a reciprocity treaty; and Brazil provides in its annual budget law for reductions on a limited number of articles from the United States, in return for favorable customs treatment of its chief products in the United States. Canada is the only country with an "intermediate" tariff, which performs the functions of a "conventional" or "minimum" tariff. In the case of practically all French

colonies, the preference to the mother country amounts to total exemption from duty. This is also the case in the Philippines so far as imports from the United States are concerned.

While in most foreign countries imports from the United States are entitled to "most-favored-nation" treatment—that is, duties as low as those accorded any other nation's imports—and to preferential rates of duty in two countries (Cuba and Brazil), there are a number of countries in which they are subject to the "general" tariff, as in Canada, or in which only a part of the "minimum" or "conventional" tariff is granted to the United States, as in France and Germany. It is therefore essential for the prospective exporter to ascertain beforehand whether there is any difference in customs treatment between his product and that of his competitor in a given market.

In some countries, especially Latin-American countries, imports are subject to surtaxes in addition to the rates of duty prescribed by the tariff proper. In a few instances (Ecuador and Venezuela are examples), the surtaxes are either higher than the principal rates or amount to a very large proportion of such rates. These surtaxes are imposed for purely fiscal reasons and should,

on that account, be distinguished from the retaliatory surtaxes provided in most tariff laws to be imposed in cases of discrimination. Retaliatory taxes are very seldom put into effect.

Export Duties

Export duties are levied in most Latin-American countries and in many of the colonies. While such duties are imposed primarily for the purpose of revenue and are usually applied to the principal products of the country—such as nitrates in Chile, tin in Bolivia and the Straits Settlements, coffee and rubber in Brazil—they are sometimes levied for the purpose of encouraging domestic industries by restricting the exportation of the raw material used in such industries. Instances of export duties levied with that end in view may be found in the duty on pulp wood in some of the Canadian provinces, on rags and rubber waste in Russia, and on rags in Spain. By the Constitution of the United States, taxes on exports are prohibited.

Free Lists

Most tariffs provide for the free admission of certain articles. The "free list" usually includes articles imported for the use of the government, effects of travelers and settlers, articles imported by diplomatic representatives of foreign countries, articles of small value imported for free

distribution, such as advertisements, small samples of cloth or wall paper, and a number of raw materials. In some countries the list also includes machinery for certain manufacturing industries, mining and agriculture. In addition to the articles on the original free list of the tariff, some products are placed temporarily on the free list by law or executive decree, in order to meet certain emergencies, such as crop failures, epidemics and the like. In some cases the free list is resorted to for the purpose of combating monopolies—if a certain product becomes subject to an industrial monopoly within the country, it is put on the free list to encourage competition from outside.

Practically all customs tariffs contain a list of goods the importation of which is prohibited. Such a list usually includes articles excluded on moral or sanitary grounds; articles subject to monopoly, such as tobacco and matches; books infringing copyrights; and, in many Latin-American countries, certain military supplies and explosives. The list is increased from time to time by decrees issued under a general law authorizing the exclusion of articles coming within a certain classification.

The customs laws of most of the industrially and commercially developed countries

provide for refund of duty or "drawback" upon the exportation of articles manufactured from imported raw or semi-manufactured materials, or for temporary importation of such materials under proper security, without payment of duty.

Shipping Documents

The various shipping documents required in foreign commerce have been dealt with in detail in previous units of the Course. It is necessary here only to emphasize the importance of complying with all of these requirements.

The consular invoice, which is required in many Latin-American countries and some others, should go forward on the vessel that carries the shipment. This is important for the reason that the foreign country usually imposes heavy penalties for failure on the part of the importer to present the invoice within a brief period after the arrival of the shipment.

In the majority of cases the consular fees for the certification of invoices are determined by the value of the shipment. They may therefore be regarded as a surtax on imports to cover the cost of maintaining the consular service, rather than as a fee for services performed. In a number of countries the consular certification of bills of lad-

ing is also required, but the fees for that service are comparatively low.

"Certificates of origin" are required for shipments to a few European countries, like France, Italy and Spain, for the purpose of ascertaining whether the shipment originates in a country entitled to reduced rates of duty. In Argentina and Paraguay the certificate of origin is required for statistical purposes. The invoice required for shipments to Cuba contains a special declaration for shipments from the United States, which must be signed in order to have the shipment admitted at the preferential rates of duty levied on products of the United States.

Clearance of Shipment

The customs regulations of foreign countries generally require the consignee to make his entry within a few days after the arrival of the shipment, and fines are usually provided for failure to comply with this rule. If the shipment is not claimed within a certain period it is considered as abandoned and disposed of at public auction. Cases have been known in which irresponsible importers preferred to abandon a shipment rather than pay the high rates of duty imposed. In many countries, especially in Latin-America, heavy penalties are prescribed for discrepancies, in regard to quality or quantity, between the data in the entry or

invoice and the results ascertained by examination. As the entry is based on the information supplied by the exporter to the consignee through the invoice, it is quite obvious that the invoice should be prepared with the utmost care, so as not to subject the importer to the payment of a fine. Penalties are also provided for omitting any prescribed detail from the invoice, such as the nationality of the vessel, or the name of the master.

In addition to the general regulations governing the importation of goods into foreign countries, certain products—like foodstuffs, medicinal preparations, live animals, explosives—are subject to special regulations prescribed by sanitary laws, laws for public safety and similar legislation. In many countries the importation of prepared foodstuffs is conditional upon the presentation of certificates of purity (or freedom from certain detrimental admixtures) issued by the proper authorities in the country of origin, supplemented by a chemical analysis in the country of destination. In the case of importation of live animals veterinary certificates are required in many countries, and for plants and seeds inspection certificates are often required. Many countries have strict laws regarding the sale of drugs and medicinal preparations, and the importation of

such products is strictly regulated in regard to labeling and composition. In some countries it is required that every pharmaceutical preparation be passed upon by a special board and registered before it is allowed to be imported.

XIII

Patents and Trade-Marks

PATENTS are granted by the government in order to encourage invention by allowing the patentee exclusive control and ownership of his invention. This has often a high pecuniary value. It is the only kind of monopoly the law favors. In order not to deprive the public, however, of the benefits of progress in the arts and sciences, the term for which the patent is allowed is made of limited duration.

In the United States this duration is 17 years; in Great Britain and Australia, 14 years; in Germany, France, Italy, Austria, Argentina, Russia, Brazil, Switzerland, Portugal, Japan, the Scandinavian and a great many other countries, 15 years; in Canada, 18 years; in Belgium, Spain and Mexico, 20 years. The shortest maximum term seems to be Uruguay, 9 years; the longest, Colombia, where at the option of the government a patent up to 50 years may be granted.

The first requirement in obtaining a pat-

UNITED STATES PATENT OFFICE

The duration of patents varies in the different countries, from 9 years in Uruguay to 50 years in Colombia. In the United States it is 17 years.

ent is that the invention be "new." It must also be "useful." In the United States "any new and useful art, machine, manufacture or composition of matter, or any new or useful improvement on any art, machine, manufacture or composition of matter" can form the subject of a valid patent.

What is Patentable?

The various patent offices and patent laws of the world have widely differing ideas as to what is "new." The subject is of particular importance to foreign inventors. Sometimes, "new" means that the device or process has never been worked in the country; sometimes, that it has never been published in the country—what has happened abroad does not matter. The test usually applied is whether or not there has been publication sufficient to enable an expert to manufacture therefrom.

On the other hand, some patent offices rule that if the thing has been worked or publicly written about abroad, even if merely in the official patent publications, that fact is a fatal bar. For such countries, then, the American inventor or his backer has to see to it that his application is filed abroad at about the same time that he applies for patent in the United States.

Most countries, however, strike a happy

medium and allow a foreign inventor a certain length of time after he has obtained his home patent, within which to apply for the foreign patent. It is true, moreover, that certain countries have special regulations in regard to patents of importation, and it is a very frequent rule that the life of a patent expires with the expiration of the home patent.

International Union

An International Convention for the Protection of Industrial Property exists. The United States is a party to this convention, with Great Britain, Austria, Australia, Belgium, Brazil, Cuba, Denmark, France, Germany, Holland, Hungary, Italy, Japan, Mexico, New Zealand, Norway, Portugal, Greece, Santo Domingo, Servia, Spain, Sweden and Switzerland and a number of colonies or dependencies of European countries. Under it, the first application for a patent in any country gives protection for twelve months from the date of the application in the other nations of the Union. However, in some of the European countries belonging to the Union, if anyone manufactures the product before the application for a patent is filed, he can go on using the invention without paying royalty. A further advantage of the Union is that it gives three years (from date of application)

within which to work in the country—a longer time often than is granted under the local laws.

The procedure for obtaining patents is generally similar in the highly developed industrial countries. Application has to be made either personally or by attorney, and drawings and specifications must be submitted setting forth the claim. A strict technical examination is then had, during the course of which the examiners may hold special hearings and call for models. Opportunity is often allowed for adverse claims, oppositions or interferences. Finally, if all requirements have been satisfactorily complied with, the patent issues.

France is a notable exception. There, no official examination is made of the scientific merits of the invention, and also in minor countries not industrially developed examination is unusual. In one or two Latin-American countries, the action of the government as to the granting of the patent, the amount of taxes or fees to be paid and the duration of the patent is wholly arbitrary.

The requirements for claims are usually most technical. Too great care cannot be exercised in the selection of a patent attorney, especially if patents are to be taken out in several countries. What is a very well drawn

claim for one country may be of little value for another. In addition to lawyers transacting an international business, there are a number of commercial firms, with offices in one or more of the cities of the United States, who make a specialty of international patent and trade-mark business, and have correspondents or offices the world over.

Once the patent has been obtained in the countries where it is deemed necessary or advisable, the following points have to be carefully looked out for:

Keeping the Patent Alive

1. The annual tax or subsequent special taxes must be paid. In England, a tax is required before the end of the fourth year, and progressive taxes thereafter.

2. The patent must be worked within the country as the law demands. It is very frequently required that the patent must be worked within a certain time, frequently one or three years after it is granted, and a continuous interruption for a prescribed period entails a forfeiture. Often it is necessary to get a certificate of working, sometimes required annually.

3. An agent domiciled in the country, satisfactory to the Government, is often required.

The degree and effectiveness of protection given by a patent varies greatly. A patent, while in force, usually prevents others from importing, selling or manufacturing the invention. The laws enjoin and punish infringements, sometimes by imposing forfeiture and multiple damages; in many countries infringement is a criminal offense.

Protection Varies

The full effect of the issuance of the patent, however, varies with the country. In some countries—Germany, for instance—a patent is a very valuable protection. It is guaranteed by the government until a successful suit is brought against the patent office to annul it. In other countries—including, unfortunately, the United States and Great Britain—the government does not guarantee anything in the patent, but simply gives the patentee the right to the exclusive use of his invention, subject to certain limitations and so long as nothing against the validity of his patent shall be proved. The patentee must therefore be prepared to fight for its validity in the courts at great expense. A vast number of patents now existing undoubtedly would not hold water if suit were started against an infringer, who can set up all kinds of defenses to prove the patent not valid. Not so in Germany. There, it is no

defense in an action for infringement, that an invention is not new, not sufficiently described or not patentable; and after five years, the patent cannot be upset at all, not even in a suit against the patent office for want of novelty.

In countries where no examination is made, the patent is granted entirely at the risk of the applicant as to whether it infringes a prior patent or has any validity at all.

In Great Britain and many other European countries, foreigners who do not work the patent in the country can be compelled in the public interest to grant a compulsory license or the patent can be revoked. Often the provisions are such that the practical effect is to compel manufacture by the patentee in Great Britain. In most European countries, the government has the right also to purchase an outstanding patent or to use it for governmental purposes, chiefly those of military and naval defense and warfare. Where compulsory licenses are granted or the government takes over an invention, reasonable compensation is paid.

The chief object of registering trade-marks is to protect the owner against imitation, and to obtain the advantage, benefit and good will of a distinctive mark. The complete

protection of a business name is a matter of the greatest importance. No exporter is safe in trying to build up a market for a particular brand of goods unless he has first assured himself that his rights to the use of that name will be protected in that country.

Trade-Marks

Merchants and manufacturers who have or who desire foreign trade, and want protection for their trade-marks, must register them in every country or colony where their goods may be sold. Registration in the United States gives no protection whatever abroad; native manufacturers or dealers or unscrupulous foreign competitors often "pirate" and counterfeit American marks. Registration cannot be made too early.

Unfortunately, the laws of many of the countries of the world do not always recognize the person who is morally and as a matter of fair dealing entitled to the mark, as the legal owner. In many countries, any schemer can come along and if he is first in registering the mark, he becomes the legal owner, although he may never have manufactured or sold under it. Thus, foreign manufacturers and dealers who have built up such a valuable good will at home by the use of a special name that it has acquired international reputation, have, when

Pirating Marks

attempting to market their goods in a foreign land, found that their mark has been pirated; they themselves are infringers and law-breakers, and they are forced either to compromise with the blackmailer or forego the use of the particular name.

Registration is granted to the first applicant in Germany, Hungary, Japan, Sweden, Portugal, several of the Balkan States and nearly half of the Latin-American countries, including Argentina, Chile and Uruguay, and possibly Mexico, where there seem to be conflicting opinions as to the protection to be given to the moral owner under the law. In practise, Mexico has been a fruitful field for the marauder and blackmailer; and the first user, the person morally entitled to the mark and who may have made it valuable, is shut out.

How it Works in Argentina

In some of these countries, notably Argentina, if the first user does not file his renewal at the expiration of the registration period, he can be deprived of his rights by some other applicant taking advantage of the fact. The Argentine court has said, "Whatever may be the objection that can be made to the system adopted by our law of marks, it is certain that, according to that system, registration confers an exclusive right of property in the mark

registered, in favor of him who registers, regardless of the fact that any other person has used the said mark as his own in commerce, without having registered it." The Argentine law fixes a term of four months (counted from the date of registration at home) within which owners of foreign marks must present their application; otherwise, the first comer can get the mark.

In some other countries, a fixed period (two years in Uruguay) is granted within which the first user can come in and have the other registration annulled. In Germany, the first registrant acquires the sole right to protection, and can prevent even a prior user of the mark from using it in Germany; he can even have goods bearing the mark seized upon importation. But there is a period of grace of two years after the expiration of the original period within which to obtain renewal.

In other countries, in general, registration of trade-marks is either granted only to the first user, or is merely declaratory of title previously acquired by use — sometimes within the country (Belgium, France, etc.), sometimes in foreign countries. In the United States, the law grants registration to "the owner"; so a foreigner is not subject to having his mark pirated here. In several

countries registration by the owner is compulsory before his complaint can be heard; he cannot pursue infringers, either civilly or criminally, if he has not registered. He can, however, apply to have wrongful registration by another annulled, if he does so within the time limit set by the statute of limitations. In Bolivia goods imported are subject to confiscation unless the mark is registered.

Formalities Required in Foreign Registry

The formalities usually required for registering an American trade-mark in foreign countries are: (1) a power of attorney, sometimes in the language of the foreign country, and usually requiring legalization by its consul; (2) a liberal number of fac-similes of the trade-mark; (3) an electrotype or woodcut. Frequently, a certified copy of the home registration, also legalized by the consul, is necessary, and a statement or description of the mark and of the goods and of the applicant's name and address.

Upon presenting the application and paying the fees (usually at the patent office) publication is made and opportunity allowed adverse claimants to make opposition. Usually, even after the registration, suit for annulment can be brought by an injured party. Peru permits applications to be filed in her consulates abroad.

The rigor of the law as to registration is mitigated to a slight extent by distinctions made in many Latin-American laws between a manufacturer's mark (*marca de fabrica*) and a mark of commerce (*marca de comercio*). Thus the Bordens, as manufacturers, succeeded in obtaining registration in Uruguay of the trade-mark "Eagle Brand," notwithstanding the opposition of a local dealer, not a manufacturer, who had registered a like mark for foods and beverages in general.

A distinction is also made between these marks, on the one hand, and a trade name, partnership or corporate. Thus, the Cadillac Motor Car Company, which had a valuable trade in Argentina but had neglected to register the name "Cadillac," was recently saved by a narrow margin, and succeeded in obtaining annulment of a mark registered by a usurper of the name Cadillac. In this case the court held that the usurper's registration was unlawful as it was the trade-name of a corporation which had been used in Argentina prior to the registration and for which, as a trade-name, registration was not necessary.

The period for which registration is granted varies. It is 10 years in Argentina, Austria, Bulgaria, Chile, Denmark, Finland,

Germany, Greece, Guatemala, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Russia, Servia, Sweden, Uruguay; 14 years in Great Britain and most British Colonies, including Australia, New Zealand and many of the West Indian Islands; 15 years in Brazil, Cuba, France, Roumania and Turkey; 20 years in Colombia, Santo Domingo, Ecuador, Mexico, Holland, Japan, Porto Rico, Salvador, Spain, Switzerland and the United States; 30 years in Venezuela and the Philippines; and for perpetuity in Belgium, Canada, Honduras, India and Italy. In Bolivia, the term is perpetual, but subject to an annual tax. A lesser term than the maximum allowed can sometimes be applied for; in Russia, for example, application can be made for any period from one to ten years.

Duration of Registration

In many countries, the privilege granted by the registration of a foreign trade-mark expires upon the termination of the period of registration in the home country. In several nations, the continuance of the right is conditioned either upon use of the mark within the country within a fixed period (frequently one or three years), or upon continuous use in the country.

In order to be able to prosecute infringers, it is frequently necessary to use on the label

words in the language of the country, equivalent to "Registered Trade-mark" or the like.

American manufacturers and exporters should never allow agents, even under a contract providing for reassignment upon demand or at the termination of the agency, to register trade-marks in their own name. Such a contract is not always enforceable as a matter of law, or at least might require expensive litigation to enforce.

XIV

International Law

THE subject of international law is usually divided under two heads: public international law and private international law. The latter is better called "the conflict of laws." The two occasionally overlap.

Public international law is concerned with the direct relations between sovereign states. Private international law looks to private rights. Its principles answer the question: Does the law of this or that country apply to a juridical situation? Thus, when parties married in one country are living together in another, when property situated in one country is to be transferred to another, when a contract is made in one country to be performed in another, or when suit is brought in one country for breach of an obligation arising in another, a juridical situation arises in which the law applicable might be in doubt. This doubt is settled by the principles of "the conflict of laws." Its great practical importance as the balance wheel of international commerce, protecting the rights of

Private International Law

traders in one country against unreasonable applications of the local law of another, is now generally recognized. Its development heretofore has been left to courts and jurists; it has been little affected by treaties, general international agreements or the practises of diplomacy.[1]

In the future, treaty modifications can be looked for, although it is probable that the British Empire and the United States, on account of their peculiar systems of law and internal constitution, will be among the last nations to enter into any international agreements on the subject. A few conventions on individual points (such as civil procedure, marriage, divorce, guardianship) have already resulted from the Hague Conferences. The United States has not been a party to these conventions.

Public International Law

Public international law, or the law of nations, is to be found in the established usages of nations, in treaties and in general international agreements. The contending or contracting parties here are not individuals, but sovereign states. The dispute or agreement

[1] Definition and instances are taken from Beale: The Conflict of Laws, now in publication (Harvard University Press), which, it can be confidently predicted, will be the standard authority in this country on the subject.

may center in the rights of individuals, the respective citizens of the countries engaged; and so the subject includes such questions as nationality, naturalization and the legal condition of foreigners.

The chief practical difference between the two subjects is this: Questions of private international law are fought out in the courts; questions of public international law are settled by diplomacy, by international arbitration or, as a last resort, by war.

When a war breaks out, attention is sharply focussed on the law of nations. Subjects like contraband and the rights of neutrals that have long slumbered, become the daily topic of the exporter. In the face of charges that the belligerent nations in the European War have set at naught neutral rights and brushed aside the law of nations, it may seem almost satirical to refer at all to the subject. But law, international as well as national, has always grown by struggle: rights do not exist unless they are asserted and fought for, whatever may be deemed the appropriate forum. When international law seems to be at its lowest ebb, then is the time of most crying need to emphasize its existence and the sanctity of its elementary principles.

Contraband of war are prohibited goods—

goods which neutrals may not carry to a belligerent nation without risk of loss through interception by another belligerent. A common error on the subject is to suppose that a nation violates its obligations as a neutral if it permits its citizens to ship contraband. This is not true. There is a perfect right to do so, but the persons who ship do so at their own risk. If the goods are captured, they can lawfully be confiscated by the belligerent.

Contraband of War

What constitutes contraband? Properly, only articles calculated to be of direct use in aiding the belligerent to carry on the war and nothing should be so called unless nations have agreed so to consider it. Some articles, primarily or ordinarily used for military purposes, such as arms and ammunition, are absolute contraband. Other articles, which may be used either for war or for peace according to the circumstances, are only conditional contraband. These latter, in strict law, should be confiscated only if actually destined for military purposes. But in all wars—and notably in the present—article after article, ordinarily of the most peaceful nature, has been placed by the belligerent nations on the published contraband lists. We have seen such conditional contraband unlawfully confiscated when it

was destined not to a belligerent nation, but to a neutral nation, on a mere presumption that it was ultimately destined to a belligerent.

Blockade

It is never disputed that a belligerent has the right to institute a blockade of an enemy's territory, directed to cut off all neutral commerce. But a mere declaration is not sufficient—a paper blockade will not do. There must be sufficient force present to make it effective. The penalty for violating a blockade is confiscation of the ship; and the cargo, too, is prima facie subject to seizure.

If they do not violate a blockade, bona fide neutral ships are not lawfully subject to capture or destruction. Cargo is on a different footing and has furnished some of the most vexed questions in international law. On the whole, it has been generally accepted as law that enemy's goods are subject to capture even on neutral vessels (without however making the ship guilty) and bona fide neutral goods (not contraband) are not subject to confiscation even when on enemy ships. Confiscation is not arbitrary, but is conducted by due process of law in prize courts.

Such matters as the foregoing have been frequently provided for in the commercial treaties entered into between nations and

some progress has been made also in formulating definite rules by means of general conventions adopted by a number of nations. The Hague Conferences have been the leading factor in securing these agreements.

Commercial Treaties

Commercial treaties are now generally entered into by all nations and are a practical necessity of commercial intercourse between them. The subjects covered usually provide for importation and exportation of merchandise and the ordinary incidents thereof, including customs and navigation charges, the admission of vessels to port, the coasting trade, consuls and their rights, fisheries; the legal position of foreigners in regard to residence, property and trade, inheritance, taxation and exemption from disabilities, and nationality.

A commercial treaty generally contains what is known as "the most favored nation clause." The character of this clause differs somewhat according to the language employed, but it usually grants to the contracting nation whatever advantages in the matters comprised within its stipulations have been allowed or may thereafter be conferred on any third or foreign state. In other words, it is a convenient catch-all and prevents unfair discrimination. The most favored nation clause, however, does not

preclude special reciprocity arrangements nor prevent discrimination in favor of mother countries or colonies.

Commercial Treaties of the United States

An epoch-making treaty was that negotiated by Commodore Perry with Japan in 1854, which was the first step in the movement to open up Japan to foreign trade. The United States has commercial treaties with Argentina (1853), Austria-Hungary (1829), Belgium (1875), Bolivia (1858), Borneo (1850), China (1903), Colombia (New Granada, 1846), Congo (1891), Corea (1882), Costa Rica (1851), Cuba (1902), Denmark (1826, 1857), Egypt (1884), Ethiopia (1903), France (1822), Germany (Hanseatic Cities, 1827, Mecklenburg-Schwerin, 1847, Prussia, 1828), Great Britain (1815), Greece (1837), Honduras (1864), Italy (1871, 1913), Japan (1894, 1911), Liberia (1862), Morocco (1836), Muscat and Zanzibar (1833), Netherlands (1839, 1852), Ottoman Empire (Turkey, 1830), Paraguay (1859), Persia (1856), Servia (1881), Siam (1833, 1856), Spain (1902), Sweden and Norway (1878), Switzerland (1850), Tonga (1886), Tripoli (1805), Zanzibar (1886).

Russia is a notable exception. The treaty with Russia was recently abrogated, it will be recalled, because that country persisted in

Photo by Brown Bros.

Peace Palace at The Hague

Courtesy of Pan-American Union

Pan-American Union Building, Washington, D. C.

THESE BUILDINGS REPRESENT THE TWO GREATEST MOVEMENTS TOWARD THE REALIZATION OF THE IDEALS OF INTERNATIONAL LAW.

discriminating against certain American citizens on account of their religion.

Treaties merely between two contracting parties were found insufficient to cope with the complexities of nineteenth century international commerce. The first forward step was the European Telegraphic Convention and Union (1865). This was followed by the Universal Postal Union (1874), the success of which is well known. Other international acts and conventions of purely commercial interest to which the United States is a party are: for the establishment of an International Bureau of Weights and Measures at Paris; for the International Protection of Industrial Property (see chapter XIII); for the Protection of Submarine Cables; for the publication of Customs Tariffs; on Literary and Artistic Copyrights; and the Radiotelegraphic Convention. The various Pan-American conferences have brought forward a great many proposals, but other than the establishment of the Pan-American Union, concrete results have not yet been produced in the realm of positive law.

International Unions

In conclusion, a word may be said as to the social duty of the overseas trader to aid

The Duty of the Overseas Trader

in the development of the law. Business men should accept the law not merely as an extraneous fact. The law is not immutable—it is a living thing—and they should play their part in its growth.

At home, they should work for uniformity of commercial law throughout the entire expanse of the United States. Away with the present slough of despond, the morass of conflicting laws in forty-eight sovereign jurisdictions! Business men should urge the adoption in their home states of the uniform laws proposed by the Commissioners on Uniform State Laws and advocate the adoption of such immediately realizable reforms as a federal incorporation act and a federal bill of lading act. Further, they should work for an amendment to the Constitution which would give Congress power to pass uniform commercial laws of general application or to regulate all commerce and not merely interstate and foreign commerce.

In foreign affairs, business men should foster the movement for international conventions in matters of commercial law. Scarcely a beginning has been made. The field is capable of a vast development. None should be more keenly interested in it than the trader.

SUGGESTIONS AS TO FURTHER READING

A comprehensive collection of mercantile law is the series, now in course of publication, entitled *The Commercial Laws of the World.* The volumes contain the text of the laws in the original languages, together with translations into English, copious introductions, notes and bibliographies. The volumes are not of uniform excellence but, on the whole, the work is well done. Twenty-three volumes have been issued to date. In regard to important countries not yet reached, the work can be supplemented as follows: Japan —Lönholm's *Translation of the Commercial Code;* de Becker's *Commentary on the Commercial Code.* Italy—Raike's translation of the *Maritime Codes* (the Commercial Code has been translated into French). No English translations of the Russian codes are extant, but there are translations into French.

No shorter book on foreign commercial law in general has been published in English since Leone Levi's in 1851. A good booklet for both reading and reference is the Department of Commerce's Special Agents' Series No. 97 (Commercial Laws of England, Scotland, Germany and France). A companion booklet on South America by Dr. Borchardt is in preparation. The Department's publication, *Trust Laws and Unfair Competition,* by Joseph E. Davies, is a valuable work covering Federal, State and foreign law. The

publications of the Comparative Law Bureau of the American Bar Association are important for foreign law.

The *Encyclopedia Britannica* will be found an easily accessible and reliable source of information as to the law of Great Britain. Some of the legal articles also contain information as to Continental and American law.

A number of text-books for colleges and business schools on American commercial law have been published. The best is probably Huffcut's *Elements of Business Law.* Gerstenberg & Hughes's *Commercial Law: a Treatise for Business Men* (N. Y., 1913) is more recent and somewhat more comprehensive. However, I would rather advise the reading of the standard text-books on the various individual topics of commercial law, used by law students and even practitioners—such as *Pollock on Contracts, Williston on Sales,* and the volumes of the *Students' Series* and the *Hornbook Series.* The extra time required will be well repaid.

The daily replies of the New York *Journal of Commerce* to questions of law are often of especial interest to the exporter. Selections of these "Commercial Precedents" have been published. Also intended for the practical use of business men are the reprints of *Parsons' Laws of Business for All States and Territories and the Dominion of Canada. Hubbell's Legal Directory* (annual), partly along the same lines, is reliable.

QUIZ QUESTIONS

I

1. What is the meaning of the term, "the law merchant"?
2. What countries are included in the "common law" group?
3. In general, what legal subjects are covered by the civil code?
4. What countries are included in the French law group? In the German law group? What countries have mixed codes?
5. Name five enactments codifying the laws of England.
6. What four acts codifying the law have been drafted by the Commissioners on Uniform State Laws of the United States and adopted by some of the states?
7. What are the boundaries of a law's jurisdiction?
8. In what way are the consular courts in China and Turkey exceptions to the general rule of jurisdiction?
9. What are mercantile courts?

II

10. Why is it important to the American exporter to know whether his prospective representative or customer abroad is legally classed as a trader or non-trader?
11. What five duties are imposed on traders by the commercial codes?
12. What is a mercantile registry?
13. What is the status of the notary in foreign countries?
14. What is the difference in France between the free brokers and the privileged brokers?
15. What is the general practise in Latin countries with reference to the management or disposition of a wife's property?
16. What is the rule of common law with reference to contracts made by an "infant"?

III

17. What striking difference exists between the common law and the civil law with reference to the entity of a partnership?

18. Name three forms of group activity in business recognized in the codes.

19. What are the characteristic features of a limited partnership?

20. What is "a limited partnership with shares"?

21. What is the German limited liability partnership?

22. What is the basic theory of the common law with regard to corporations? What is the theory of the law in code countries on this subject?

23. What advantage attaches to the stock company as a type of business organization?

IV

24. What federal commission has regulatory authority over interstate commerce in the United States?

25. What federal law was designed to make impossible the operation of monopolies and combinations in restraint of trade in the United States?

26. What is the purpose of the Federal Trade Commission?

27. What courses of dealing are forbidden by the Clayton Act?

28. What generally admitted defect of the original anti-trust law does the Clayton Act seek to remedy?

29. Name 12 forms of unfair competition.

V

30. Name four mediums through which an American business house may carry on business in foreign countries.

31. What is a true agency?

32. In entering business in a foreign country what requirements must be met by the incoming branch or agency?

33. What advantages come from organizing a subsidiary company under the laws of the foreign nation in which business is to be conducted?

VI

34. What are the five duties of an agent to his principal?

35. What are the three duties of a principal to his agent?

36. What exception is there in England to the general rule that a principal is liable to third parties for his agent's acts?

37. What is the difference between the Anglo-American and the civil law in regard to the doctrine of undisclosed principal?

38. When is a power of attorney necessary in foreign trade relations?

39. What safeguard should be provided in terminating an agency abroad?

VII

40. What is the difference between a contract of sale and a sale?

41. Distinguish between a condition and a warranty.

42. What is the meaning and application of *caveat emptor?*

43. What four principles are now generally recognized as implied warranties?

44. How does the Uniform Sales Act modify the American practise with regard to the effect of acceptance of goods upon the seller's obligation?

45. When, in a sale under foreign law, does title to property pass? What principle governs here in English and American law?

46. Name two exceptions to the rule that the risk for goods is in the owner.

47. What three remedies are usually open to the seller in the United States when the buyer wrongfully refuses to accept goods? How does English and other foreign practise differ on this matter?

48. How does American law differ from foreign law in protecting the buyer's rights when the seller refuses to deliver goods?
49. What is a conditional sale?

VIII

50. What is the general law in regard to the liability of carriers?
51. When is the carrier not liable?
52. In what fundamental way does the law of the United States differ from that of civil law countries in the regulation of carrier's services?
53. What means are used by carriers to limit their liability?
54. What are the main provisions of the Harter Act?
55. Name eight provisions of the law affecting vessels of the United States registry in the foreign trade.

IX

56. What is the theory underlying the bill of exchange?
57. Under the Uniform Negotiable Instruments Law what is required in a negotiable bill of exchange?
58. What special advantages attach to a negotiable instrument?
59. Why is it important, in export transactions, to have a definite stipulation as to interest?
60. How may the usury laws of foreign nations affect exporters?

X

61. What advantages do drafts and promissory notes have over an open account?
62. What is the difference between ordinary suits and execution suits?
63. What are the three principal forms of collateral security?

64. What is the difference between the law of pledge in the United States and that in code countries?
65. What is the difference between a guaranty and a suretyship?

XI

66. What precautions should be taken by the exporter to insure that he has proper evidence of his customer's indebtedness?
67. Under what circumstances may a suit against a foreign debtor be brought in the home country?
68. Why are the costs of collections abroad higher than at home? Name five reasons.
69. Name four differences which obtain in bankruptcy laws between the code countries and the common law countries.
70. What four kinds of bankruptcy are recognized abroad?

XII

71. What is the meaning of the term, "tariff schedules"?
72. What are "specific" rates of duty? What are "ad valorem" rates?
73. What is a "conventional" tariff? What is a "preferential" tariff?
74. Name three instances of export duties levied in Latin-American countries.
75. How is the "free list" used to combat monopolies?
76. What is a "drawback"?

XIII

77. Why is it important that an inventor file his application for a patent abroad at the same time that he applies in his home country?
78. Name 24 countries that are parties to the International Convention for the Protection of Industrial Property.

79. What advantages are secured through this international agreement?

80. In what particulars is the French procedure for securing a patent different from that of other highly-developed industrial countries?

81. What three points must be safeguarded in keeping a patent alive?

82. Why is a patent issued by the German government more valuable as a protection than one issued by the United States or Great Britain?

83. Why is it generally necessary to register a trade-mark immediately in a foreign country, even though the owner of the trade-mark may not contemplate an immediate selling campaign in that territory?

84. What formalities are required for registering an American trade-mark in foreign countries?

85. What is a *marca de fabrica?*

XIV

86. What is "the conflict of laws"?

87. What is the chief practical difference between public international law and private international law?

88. What is contraband of war?

89. Under what circumstance is a neutral ship subject to capture or destruction?

90. Are an enemy's goods carried on a neutral ship subject to confiscation?

91. What is the meaning of the term, "the most favored nation clause"?

92. Name eight international commercial unions.

93. What is the great present need of commercial law in the United States?

(P. 1891—Rev.)